THE

HISTORY

OF

A SUIT AT LAW,

ACCORDING TO THE

PRACTICE OF THIS STATE,

WITH A SKETCH OF THE PRACTICE IN THE COURTS OF THE UNITED STATES FOR SOUTH CAROLINA.

BY

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SECOND EDITION.

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PREFACE TO FIRST EDITION.

This slight sketch of the practice of the State is not published with the expectation that it can be of any value to the active members of the profession. It does not aspire to such dignity; but is addressed solely to the students at law, in the hope that it may furnish to them some assistance in ascertaining what is the practice of the Court, and what the authority for it.

CHARLESTON, *December*, 1856.

PREFACE TO SECOND EDITION.

The kind welcome extended by the profession to this little work, soon exhausted the first edition, and a second has, for some time past, been desired.

In preparing it I have noted such points as have been suggested by the recent reports, and have added, at the request of many of the Bar, a sketch of the practice on the Common Law side of the Courts of the United States.

The nature and constitution of the United States Courts require the practice of those Courts, in each State, to conform to that adopted by the State Courts, and this diversity of practice is possibly the reason why no general treatise on the subject has been published. Some guide to the practice has, however, been eagerly desired by many of the Bar in this State, and as the laws defining the jurisdiction of the Court and regulating its proceedings, are contained in the Acts of Congress and Decisions of the Courts of the United States, comprising many volumes, not accessible to the majority of the profession, I have added a chapter on the progress of a suit at law in the United States Court. In doing so, I have adhered strictly to the original plan of the work, which is, to furnish an elementary guide to the student, rather than a manual of practice for the lawyer.

With a deep sense of the kindness which has been so freely extended to me by my professional brethren, I again submit myself to their good will.

J. C.

Charleston, *October* 20th, 1860.

THE HISTORY OF A SUIT AT LAW.

The first step in the commencement of an action at law, is to bring the defendant into Court, to answer the charge made against him by the plaintiff; this is effected by the writ, technically styled *capias ad respondendum*. The original writ, according to the English practice, does not exist with us, but by our adoption of much of that practice, the *capias ad respondendum* still retains its appellation of mesne process, although in fact it is the original writ. The form of the writ is familiar to all, and I shall only note here some few matters touching the proper method of filling up the blanks, and the direction to be given to the writ when properly filled out.

The writ is addressed to "*All and singular the Sheriffs of the said State;*" for the process of the Superior Court of the State runs to every part of the State,[a] and the Clerk of the Court of one district, may test a writ returnable to the Court of any other district.[b] The writ must, however, be served by the Sheriff of the district where the defendant is found or resides;[c] and where there are two or more defendants to the same action, and each residing in different districts, the writ may be made returnable to the Court of the district in which any one of the defendants resides, and the defendants are bound to appear where the writ is made returnable, and where the notice endorsed on the writ requires them to appear.[d]

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[a] Act of 1789, 7 Stat, 254; 1799, 7 Stat., 293.

[b] Douglass vs. Owens, 5 Rich., 534.

[c] Act of 1768, 7 Stat., 200; Wood vs. Crosby, 2 Hill, 520.

[d] Wallace vs. Prince, 3 Rich., 178.

The manner of serving the writ upon the defendant, technically called the service of the writ, is prescribed by the Act of 1737, (7 Stat., 190,) and is either by serving a copy personally upon the defendant, or by leaving a copy at the defendant's usual place of abode. Questions sometimes arise as to which is the defendant's usual place of abode. In Gadsden ads. Johnson, 1 N. & McC., 89, the defendant resided in Charleston during the summer, and in the country during the winter; a copy writ was left at his Charleston residence in the winter, and the Court held the service insufficient, as the copy was not left at his usual place of abode; but when the defendant has his residence in the State, and has merely left the State temporarily, service by copy left at his residence, is sufficient, unless the defendant will come into Court and make affidavit that he was surprised, or is in danger of suffering injury from not knowing of the service of the writ.[a] The Act of 1737, further prescribes that where the service is by copy left, the copy shall be delivered to some white person, if there is any such to be found at defendant's place of residence, and if not, the copy is to be left at some obvious part of the house. Under this clause of the Act, the Court held that a copy delivered to a negro in the piazza of the defendant's house was a sufficient service.[b]

Where the action is against husband and wife, service of the writ on the husband alone is sufficient.[c] If against a corporation, the service must be upon the officers of the corporation, usually upon the President.[d] If against a firm, and one or more of the copartners are out of the State, or there are dormant partners, it is sufficient to serve process upon such of the copartners as may be found in the State, or are known.[e] In preparing the writ, care must be taken

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[a] Lark vs. Chappell, 1 McC., 566; Frean ads. Cruikshanks, 3 McC., 84; Bank vs. Simpson, 2 McM., 354.

[b] Alston ads. Bowers, 1 N. & McC., 458.

[c] McCullough vs. Boyce, 1 Bail., 521.

[d] Young vs. Bank of Hamburg, Dudley, 37.

[e] Act of 1792, 7 Stat., 281; Bank vs. Broadfoot, 4 McC., 30.

that there is a separate copy writ for each of the copartners constituting the firm.

Where there are several parties to a contract, they must all, according to a strict rule of pleading, be made defendants, and the absence of any one of them from the State, so that process could not be served on him, would defeat the plaintiff's action; to avoid this, the Act of 1823, (6 Stat., 212,) enables the plaintiff to sue all the parties remaining in the State—the plaintiff setting forth in his declaration, and proving at the trial, the absence of the party omitted. The judgment in such case, however, is valid only against the parties served with process.[a]

The writ must be served at least fifteen days before the sitting of the Court. 2 Treadway, 631. In serving it, it is not necessary that the Sheriff have with him the original writ,[b] nor that the writ should have been filled out before it was tested by the Clerk. Nor that it should have been entered in the Sheriff's book. If properly filled out when delivered to the Sheriff, the service of it is valid.[c]

Having shown the mode and manner of serving the writ, we come to the next clause: "*You and each of you are hereby commanded,*" the blank immediately following the command, remains unfilled, if it is an original process. If, however, a writ in the same cause had been issued to a preceding term of the Court, and the Sheriff had returned upon it *non est inventus*, and a second writ, technically called an *alias*, had to issue, the blank is filled with the words: "*as you have once already been commanded,*" if the *alias* writ is returned *non est inventus*, and yet another writ technically called a *pluries*, is to issue, the blank is filled with the words: "*as you have more than once already been commanded,*" and the *alias* or *pluries* process may be tested on any day previous to the return day thereof.[d] See further as to *alias* writs, Wilder vs. Grimke, 2 Brev., 261. Parker vs. Grayson, 1 N. & McC., 171, and Boggs vs. Symmes, 8 Rich., 443.

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[a] See the Act, 6 Stat., 212.

[b] Wallace vs. Prince, 3 Rich., 178.

[c] Miller vs. Hall, 2 Spear, 3.

[d] Moses vs. Blackwell, 9 Rich., 42.

The next blank is filled with the words, "to attach the body of ——," (the defendant); and care must be taken to set forth in full, the Christian as well as the surname of defendant, otherwise defendant may plead in abatement. The mere initial letters of the Christian name are insufficient.[a] The middle name, if there be one, may be set out by the initial letter, for in law a middle name is no name.[b] If the liability of the defendant arises from a written agreement, he may be sued by the name he signs to the contract, as his signature would conclude him from denying that it was his true name.[c] If the action is against a copartnership, set forth the full names of the several parties composing the firm. If against a corporation, or parties defending in *autre droit*, as executors or administrators, in lieu of the words, "to attach the body of," the blank is filled out, "to summon, &c." Setting forth the name by which the company is incorporated, for a corporation cannot be attached, and can only be made a party to a suit by summons and *distringas*.[d] And whilst upon this part of the process, it may be well to take a glance at the persons who may be attached, or rather at the persons who are exempt from being attached. They are embraced in three classes:

1. Persons engaged in military duty under authority of the State.
2. Persons attending Court as parties or witnesses.
3. Members of the Legislature.

Militia men and parties attending Court are exempt by the 12th section of the Act of 1839, which provides that "no Sheriff shall arrest by any process, other than such as may issue for treason, felony, or misdemeanor, any person who is engaged in the military service required by the laws of this State, or going to, or returning from the same, or

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[a] Wilthaus vs. Ludeeus, 5 Rich., 326; Kinloch vs. Carsten, Ibid, 331; City Council vs. King, 4 McC., 487.

[b] Bull vs. Franklin, 2 Spear, 47, and see Norris vs. Graves, 4 Strob., 33.

[c] Norris vs. Graves, 4 Strob., 33.

[d] Glaize vs. So. Ca. R. R. Co., 1 Strob., 72.

who may be attending upon any Court of record as party, witness, or otherwise, by order of Court, or while going to or returning from the same, *provided* that any party may be served with process at any time by delivery of a copy personally, or leaving the same at the most notorious place of residence."* 11 Stat., 28. These two classes it is thus seen, are only privileged from *arrest*, not from suit.

A greater exemption is accorded to members of the Legislature, who cannot in any manner be *sued*, during their attendance in the Legislature, or for ten days previous and subsequent thereto. § 14, art. 1, of the constitution, and Tillinghast vs. Carr, 4 McC., 152.

After specifying the persons upon whom it is the duty of the Sheriff to serve process, the writ proceeds to specify the purpose for which they are to be brought into Court, viz: "to answer to the plaintiff, (stating the full name of the plaintiff in the same manner as above prescribed for defendant,) in a plea," &c., according to the form of the action.

The form in the conclusion of the writ, "*Witness, A. B., Clerk of the Court,*" &c., has reference to the seal of the Court and signature of the Clerk in the margin of the writ, technically called the *teste*. Without such attestation no writ is valid, even though accepted by defendant's attorney. Smith vs. Assanassieffe, 2 Rich., 335. In the later case of Wicker vs. Pope, 6 Rich., 366, the process was in like manner without the seal of the Court or signature of the Clerk; judgment was had upon it and execution issued, and defendant arrested, and the Court refused to set aside the judgment, and ordered the Clerk to sign and seal the process *nunc pro tunc*. The ground of the decision was, that the defendant had by his subsequent conduct waived the irregularity. Care should, however, be taken to avoid the question by seeing that the writ is signed and sealed

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*This Act apparently overrules the Act of 1794, 8 Stat., 489, and the cases of Greggs vs. Summer, 1 McC., 461, and Hunter vs. Hunter, 1 Bail., 646; and the Act of 1791, 1 Faust., 44, and Huntingdon vs. Schultz, Harper, 452.

before it is delivered to the Sheriff. The official seal of the Court is rarely used; a wafer with the signature of the Clerk is the usage, and the Courts in conformity to the usage, have decided in Barton vs. Keith, 2 Hill, 537, that such *teste* is sufficient.

The writ may now be considered complete and ready for service, and is to be placed in the hands of the Sheriff, who executes it in the manner already specified, and returns to the Court the manner in which he has executed it, whether by personal service, or by copy left. The return must purport something capable of being understood without evidence *aliunde*, and the letters N, E, I, have no meaning. (Parker vs. Grayson, 1 N. & McC., 171.) The return of the Sheriff is not, however, conclusive, and he may be made to amend it upon proof of the facts. Whether the return must be under oath or not, is not clear, and I have been unable to find any case upon it. The Act of 1791, (7 Stat., 263,) commands the Sheriff "to make certain return thereoff." The Act of 1839, (11 Stat., 28,) simply commands him "to return" all process, &c. It is otherwise with regard to executions; for the Act of 1791, (7 Stat., 264,) expressly commands the return to be on oath. The cases of Graves ads. Belser, (1 N. & McC., 125,) and Saunders vs. Bobo, (2 Bail., 492,) referred to in Miller's Compilation, p. 203, as authority for the position that the return of mesne process must be sworn to, are both cases of final process.

The writ being duly served and returned, the next step in the cause is to be taken by the defendant, who must enter an appearance with the Clerk of the Court during the sitting of the Court to which the writ is returnable, and defendant is entitled to the last moment of the term to enter his appearance.[a] Until appearance entered the defendant is not in Court, and not entitled to plead, although there may have been acceptance of service of the writ, and plaintiff is entitled to proceed and file his dec-

[a] Act of 1791, 7 Stat., 263; Martin vs. Maloney, 1 Rich., 273.

laration and take judgment by default.[a] If there is any defect or irregularity in the writ to which the defendant excepts, the proper plan is to make the objection at the return term of the writ, by moving to set it aside; and if the motion is overruled the defendant can then appear and plead; but if the defendant postpones the motion until the succeeding term and fails, he will not then be permitted to appear and plead.[b]

The failure to appear, as has been said, precludes the defendant from pleading; when, however, it can be shown on affidavit that the failure resulted from a mistake between the defendant and his attorney,[c] or from causes beyond his control,[d] and that he has a good and legal defence, he will be permitted to appear and plead; but the permission is only accorded where the cause has not yet proceeded to final judgment, and is always granted on the condition that the plaintiff is not delayed thereby.[e] *

One copartner cannot authorize an appearance for another,[f] and where one copartner appears and the other makes default, the regular mode of proceeding is to go on and get judgment for the whole debt against the one appearing, and execute a writ of inquiry against the one making default, for the whole debt also.[g]

The plaintiff next proceeds to file his declaration, "during the sitting of the Court next after, the writ is returnable, or at any time after until the next succeeding Court."[h]

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[a] Act of 1791, Donlevy & Co. vs. Cooper; 2 N. & McC., 548; Law vs. Duncan, 2 Brev., 263.

[b] Hanks vs. Ingraham, 2 Bail., 440.

[c] Williamson vs. Cumming, 2 McC., 250; Wilkie vs. Walton, 2 Spear, 479.

[d] See Evans ads. Parr, 1 McC., 283.

[e] Schroeder vs. Eason, 2 N. & McC., 292; Wilkie vs. Walton, 2 Spear, 479.

[f] Haslett vs. Street, 2 McC., 310; Loomis vs. Pearson, Harp., 470.

[g] Simpson ads. Geddes, 2 Bay, 533.

[h] Act of 1791, 7 Stat., 263.

* The opinion of O'Neall, J., in the case of Barnes vs. Bell, 11 Rich., 20, apparently confirms a *dictum* in Frean vs. Cruikshanks, 3 McC., 84, to the effect that an appearance may be permitted after final judgment. It is, however, respectfully submitted that the *dictum* is in direct opposition to the point decided in the cases of Schroeder vs. Eason, 2 N. & McC., and Wilkie vs. Walton, 2 Spear.

According to the construction of this Act in the Bank vs. Torre, (2 Spear, 508,) by the return of the writ is meant, not the appearance term, but the very day when the Sheriff is required to make return to the Clerk, which is of course fifteen days before the sitting of the Court.[a] The plaintiff thus has the appearance term, and until the next succeeding Court, within which to file his declaration. "If, however, he should not file his declaration before the first day of the second term, after the return of the writ, he shall not be permitted to file it afterwards without obtaining leave to do so; and he shall give four days' notice to the adverse party of the time and place, when and where he intends to move for leave, unless the motion is made in open Court, in which case one day's notice shall be sufficient." 67th Rule of Court. This leave for further time to declare, can only be had, when moved for prior to the expiration of a year and a day from the date of the return; for if the year and day expire before the declaration is filed or further time granted, the plaintiff is out of Court and cannot afterwards obtain leave.[b]

If on the first day of the second term after the return of the writ, the plaintiff has not filed his declaration, the defendant may either then, or at any time within the year and day, enter up judgment of *non pros.*, as of course, and without order of Court or rule to declare.[c] The judgment of *non pros.* thus obtained, will, however, in the discretion of the Court, be set aside on payment of costs, in order to let in a trial on the merits, but the motion to set aside must come at some time within which the plaintiff could obtain leave for further time to declare.[d]

In general, a judgment of *non pros.* cannot be entered up where no appearance has been entered, or where it has been entered after the cause is out of Court.[e]

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[a] See Martin vs. Maloney, 1 Rich., 273.

[b] Bank vs. Torre, 2 Spear, 509; Wright vs. Higginbottom, 1 N. & McC., 8.

[c] Smith vs. Lewis, 1 N. & McC., 38; Wright vs. Higginbottom, 1 N. & McC., 8.

[d] Bank vs Torre, 2 Spear, 509.

[e] Murphy vs. Sumner, 1 Hill, 221; Roderick vs. Payne, 1 McC., 408.

With the declaration should be filed "a copy of every deed, bond or open account, or other writing declared on." 4th Rule of Court. This is technically called the bill of particulars, and although the words of the rule call for a "copy," the rule is complied with by filing the original.[a] The bill of particulars forms, however, no part of the record; if it be not filed, the defendant may refuse to plead until it is filed. If evidence is offered of demands not contained in the bill of particulars, the evidence may be objected to; but where evidence is given which fully sustains the count, it can be no ground for nonsuit that it does not agree with that which is no part of the count.[b]

The object of the bill of particulars is, as its name imports, merely to specify and particularize that which in the declaration is general and uncertain, and when the particulars of the demand are disclosed in the declaration, as in special assumpsit, covenant, debt on articles of agreement, &c., a bill of particulars, as it can furnish no more definite information, is needless.[c] The omission to file it when it is necessary, must be taken advantage of by special demurrer.[d]

On filing the declaration in the Clerk's office, it is the duty of the Clerk (where defendant has appeared) to post a thirty day rule to plead; but if the defendant has not entered an appearance, no rule should be posted, as the non-appearance would be thereby waived;[e] but plaintiff should obtain from the Clerk an order for judgment by default, and have the case placed on the Inquiry Docket.[f]

If the defendant has duly entered his appearance, he must file his plea at or before the expiration of the rule to plead. The form of the plea will depend on the nature of the action, and is to be regulated by the settled rules of

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[a] Davis vs. Cosnahan, 1 Hill, 373.

[b] Davis vs. Hunt, 2 Bail., 416; Edwards vs. Ford, 2 Bail., 463; Gregg vs. Vause, 8 Rich., 431.

[c] Long vs. Kinard, Harp., 47; Bailey vs. Wilson, 1 Bail., 15.

[d] Cregier vs. Smythe, 1 Spear, 302.

[e] Perkins vs. Burton, 2 Brev., 97; Law vs. Duncan, Ibid, 263.

[f] Act of 1791, 7 Stat., 263, and cases in 2 Brev., above.

pleading, and does not fall within the limits of this sketch. Upon filing it, the Clerk posts a ten day rule for plaintiff to put in his replication. Should pleadings proceed further, each party putting in a plea obtains a ten day rule, posted by the Clerk as above, within which the opposite party must file his plea in response. (See 3d Rule of Court.) So too whenever the plaintiff, by leave of Court adds a new count to his declaration, he must post a new rule to plead.[a]

If the defendant does not file his plea within the thirty days required by the rule, the plaintiff may enter up judgment for default, and have the case placed on the Inquiry Docket. The defendant may, however, on or before the second day of the term next after such judgment is entered, vacate the judgment on payment of costs—pleading an issuable plea, and submitting to such terms as the Court may see fit to impose.[b] It must be borne in mind, however, that to entitle the defendant to move to vacate the judgment by default, he must have regularly appeared to the writ.[c] Such is the general rule, but where the omission has occurred by mistake of counsel, the defendant is permitted to appear and move to set aside the judgment;[d] and that even after the second day of the term.[e]

The judgment by default, it is thus seen, may be either for default of appearance, or for default of plea; in either event, the judgment being entered up (which is done by the order of Clerk on the back of the declaration, no formal entry up of judgment being necessary,) and the case placed on the Inquiry Docket, it only remains for the plaintiff to estimate his damages; his *right* to recover is fixed by the judgment by default, and the *amount* of recovery alone remains doubtful.

If the suit is brought upon a liquidated demand—and every demand is a liquiated demand where the amount

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[a] 1 Hill, 421.

[b] 2d Rule of Court; Hare vs. Goodwyn, 2 Bay, 521.

[c] Shackelford ads. Smith, Rice Dig., Practice, No. 90.

[d] See Williamson vs. Cumming, 2 McC., 250, and cases *ante*, page 13.

[e] Sargent vs. Wilson, 2 McC., 512.

due is fixed and ascertained by some writing of the defendant[a]—it is not necessary for the plaintiff to prove his demand, or execute a writ of inquiry; but upon motion, the demand is referred to the Clerk to ascertain the sum actually due, and judgment is entered up for the amount so ascertained.[b] The opinion prevailed at one time in the profession, that where the action was on a penal bond, the plaintiff was at liberty, on default of appearance, to enter up final judgment and issue execution, inasmuch as there were no damages to be assessed;[c] but the case of Martin vs. Maloney, 1 Rich., 273, has overruled that doctrine, and the plaintiff must put the case on the Inquiry Docket, and at the term succeeding the default, move for leave to enter up final judgment, without reference to the Clerk, or execution of writ of inquiry, and this is granted by the Judge's entry on the Docket. "Judgment final."

Where, however, the demand is unliquidated, it is then necessary for the plaintiff to execute a writ of inquiry, but, unlike the English practice, there is with us no writ issued; but the case being upon the Inquiry Docket as already explained, is upon the call of the Docket, executed by the jury in attendance. The plaintiff must confine himself in his proof to the case stated in his declaration.[d] The defendant is restricted to evidence in mitigation of damages, and cannot introduce evidence in discharge of the action or of payments or other discounts.[e] In other words, he can contest the *amount* of the debt, but not the debt itself, and the jury are bound to find some damages for the plaintiff—they can never find for the defendant.[f]

Having departed from the regular course of the suit to glance at the practice where the defendant fails to appear, or appearing, fails to plead, it is necessary, before resum-

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[a] Wilkie vs. Walton, 2 Spear, 477.

[b] Act of 1809, 7 Stat., 308; The Bank vs. Vaughan, 2 Hill, 556.

[c] See Dawkins, et. al., vs. Vaughan, 1 McC., 554.

[d] Mathews vs. Sims, 2 Mills, 103.

[e] Covington vs. Rogers, 2 Bail, 407.

[f] Reigne vs. Dewees, 2 Bay, 405; Parsons vs. Cain, 1 Mills, 196; 2 Ibid, 58.

ing, to note a few matters of general occurrence in the progress of a cause. The defendant may, in reply to the plaintiff's claim wish to rely upon several matters in his defence. At common law, this could not have been done, but by the Stat., 4 Ann, c. 16, § 4, of force in this State, the defendant in any action, may, with the leave of the Court, plead as many several matters thereto as he shall think necessary for his defence. The motion for leave to plead double must be made *sedente curia*,[a] and the Court in its discretion, may grant leave to plead double any time, provided it does not operate a surprise upon the plaintiff;[b] but the proper time to obtain leave is the first Court after the filing of the declaration.[c] It seems that leave will not be granted at any subsequent Court, unless the cause had been previously continued over to the succeeding term, nor even then without giving notice to the adverse party to show cause to the contrary.[d] As the proper time to obtain leave is the first term after the filing of the declaration, and as to entitle the case to be heard, the pleadings must be made up, and the case docketed, before the Court meets, (See Rules of Court, 17–20,) it will doubtless occur to the student that there is some embarrassment in the matter, and that in order to plead double, one term viz: the term at which the motion for leave is made, must be lost; but as said by Judge Johnson in Richardson vs. Whitfield, 2 McC., 150, the defendant has the right to plead as many matters in his defence as his case permits, subject to two limitations—

"1st. That they shall not involve the ridiculous absurdity of being inconsistent, and

2d. That they shall not operate as a surprise on the plaintiff, by being made at the moment of trial. * * * * * Within these limitations the Court has no control over the right, and the whole object of applying for leave to plead

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[a] Fraser ads. McLeod, 2 Bay, 407.

[b] Holter vs. Lewis & Pepoon, 1 McC., 12; Stewart vs. McCully, 5 Rich., 83.

[c] Miller vs. Fisk, 1 McC., 50.

[d] Miller vs. Fisk, 1 McC., 50.

double is to preserve them, so that in truth the filing of consistent double pleas, so far as their merit is concerned, is a mere motion of course, which only requires the signature of counsel." The practice is to file the double pleas before the expiration of the rule to plead. The defendant, after pleading the general issue or other plea, setting forth "And the said defendant, for a further plea in this behalf, by leave of the Court first had and obtained, says," &c. Notice is thus brought home to the plaintiff of the defence the defendant relies on, and the motion for leave may be made at the ensuing Court, "so as to protect the pleas already filed from the objection that they had been filed without leave of the Court."[a] With regard to what are inconsistent pleas, it is difficult to lay down positively any rule, for since *non est factum* and *performance*, *not guilty* and *liberum tenementum*, may be pleaded together as consistent, the distinction between consistency and inconsistency savors very much of "the palpable obscure."

If the defendant has any demands against the plaintiff, embraced within the provision of the Discount Act of 1759, (4 Stat., 76,) and intends to rely upon them at the trial as an offset to the plaintiff's claim, they need not be pleaded, but may be given in evidence under the general issue, the defendant giving to the plaintiff, or his attorney, twelve days' notice, in writing, of his intention, and a copy of the accounts, matters or things that he intends to insist upon as a discount. Or the defendant may admit the justice of the part of the plaintiff's claim, and dispute the balance. In such case, it is proper to obtain, on motion, at the return term of the writ, an order of Court, granting leave to the defendant to pay into Court the amount he admits to be due, together with the costs accrued up to that time. The order being granted, the money is paid to the Clerk and his receipt taken, and the plaintiff, if he prosecutes the suit for the balance, and fails, is liable for all the costs of the suit subsequent to the payment of the money.[b]

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[a] 2 McC., 150, and Stewart vs. McCully, 5 Rich., 80.

Resuming our sketch of the progress of a suit, we come to the trial. The issue having been made up, and the case docketed, as already noted, it is ready for trial; but it may happen that when the case is called, either the plaintiff or defendant may be unprepared, and seek for a postponement or continuance of it until the next term.[b] This is obtained by motion; the granting or refusing of which is a matter altogether within the discretion of the presiding Judge. Where the continuance is moved for, because of the absence of a material witness, the motion must be supported by affidavit, setting forth that the testimony of the witness will be material to support the action or defence of the party moving; that he cannot go safely to trial without such testimony, and that his motion is not intended for delay, and that he has used due diligence to procure the attendance of the witness, and if a subpœna has been issued, the original shall be produced, with proof of service, or reason for nonservice, (23d Rule of Court.) There is nothing said as to who shall make the affidavit, but it should properly be made by the party himself, or his attorney in fact. Cases may occur in which the counsel in the cause must, of necessity, make the affidavit, but as a general rule, counsel should confine themselves to their legitimate duties of preparing and arguing the case, and leave all statements of facts to be made by the parties to the record, or the witnesses in the cause.

The rule, it will be observed, requires that the party moving for a continuance, shall set forth in his affidavit that he has used due diligence to procure the attendance of the witness, and it seems to be the settled doctrine that due diligence has not been used where the witness has not been subpœnaed.[c] If the motion for a continuance on the ground of the absence of a witness is made after the first

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[a] Broughton vs. Richardson, 2 Rich., 64.

[b] Price ads. Justrobe, Harp., 111; Ordinary vs. Robinson, 1 Bail., 25; Hunter vs. Glenn, 2 Bail., 542; Hort vs. Jones, 2 Bay, 440.

[c] Bone vs. Hillan, 1 Mills, 197; Sheppard vs. Lark, 2 Bail., 576.

term, the party moving, in addition to the above requisites, must set forth in his affidavit what he believes the witness will prove, (25th Rule of Court.) The presiding Judge is not, however, bound to grant a continuance at any time—even where the requisitions of the 23d Rule have been complied with—it still remains in his discretion.[a] Opposed to continuance is discontinuance, which is the act of the plaintiff, and is a letting fall of the action either as to one or all of the parties sued. Where the contract is joint and several, the plaintiff, although he has issued his writ against all the parties to it, may at any time discontinue as to one, and proceed to judgment against the other;[b] but this must be done by leave of the Court.[c] So, too, when there are several plaintiffs, the Court may, in its discretion, give leave to one or more of them to amend the declaration, by striking out his or their names from the declaration, where it appears that they have no interest in the cause.[d] A discontinuance may also occur where the plaintiff has allowed too long a time to elapse between any of the stages of his pleadings, but every order entered in a cause is such a continuance of it that the party cannot be held to have let fall his action until a year and a day has elapsed from the entry of the last order.[e]

If none of these collateral proceedings are adopted, but the parties are ready, and intend to try the issue, it is necessary then to have the evidence upon which they rely, in readiness before the Court. The evidence must of necessity be either written or oral, for under one or the other of these two classes must all the instruments of evidence fall. If the evidence is written, and the party is in possession of the original document, it is only necessary to produce it, together with such proof as is necessary to

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[a] State vs. Thomas, 8 Rich., 295.

[b] Karck vs. Avinger, 3 Hill, 217.

[c] Fitch vs. Heise, Cheves, 185; Bomar vs. Williams, 2 Rich., 12; Lamar, Daniel vs. Reed, 2 McM., 347; Freeman vs. Clark, 3 Strob., 282.

[d] Harkins vs. Lerrix, 2 N. & McC., 141.

[e] Perry vs. Aiken, 3 Rich., 60.

establish its validity and genuineness. If a record, and of the Court in which the trial is had, this is done by calling the Clerk of the Court from whose custody the record is taken. If the record is of another Court, then, as the original cannot be taken out of the office in which it is filed, an exemplification of it under the seal of the Court is admissible. If the written evidence consists of a deed, its validity is proved by the subscribing witnesses.

If the original, however, is not in the possession of the party, but in the possession of the adverse party, the latter may be compelled, on reasonable notice given in writing, to produce it at the trial, or admit secondary evidence of its contents. What is reasonable notice must be regulated by the circumstances of the case.[a] If secondary evidence will not serve the purposes of the party calling for the original, or is not attainable, a resort to equity by bill of discovery will procure the production of the document.

If the document sought for is in the possession of a third party, he may be compelled to produce it by serving him with a *subpœna duces tecum*, by which he is commanded to bring into Court the deed or paper wished for, and the party issuing such *subpœna* is entitled to have a return made to it before he can be compelled to enter upon the trial of his cause.[b] If, however, the deed is lost, then, on proof of the loss of the original, a certified copy from the record in the register's office is admissible in evidence.[c] What is sufficient proof of loss must in general depend on the circumstances of each particular case, but in general it is only necessary to show that the deed or paper has been diligently sought for, where it might be expected to be found, or was usually kept, and that it could not be found.[d] Where the deed is duly proved before a Justice of the Peace, and recorded, no further proof of its existence or

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[a] Reynolds vs. Quattlebum, 2 Rich., 145.

[b] Treasurers vs. Moore, 2 Tread., 755.

[c] Act of 1731, 3 Stat., 303; Purvis vs. Robinson, 1 Bay, 493; Dingle vs. Bowman, 1 McC., 177; Act of 1843, 11 Stat., 255.

[d] Peay vs. Pickett, 3 McC., 322; Floyd vs. Mintsey, 5 Rich., 372.

execution is needed: proof of the loss is alone necessary to the introduction of the copy.[a]

If the matters relied on are to be established by oral evidence, the witnesses who are to testify to the facts, must be served with *subpœna*, commanding them to attend at the Court on the day specified in the *subpœna*. Not more than four witnesses should be included in any one *subpœna* writ; and *subpœna* tickets filled out and addressed to each of the witnesses named in the writ, should be handed to the Sheriff, together with the writ; and a witness failing to obey a *subpœna*, without sufficient excuse, is guilty of a contempt, and may be punished by fine and imprisonment.[b]

If the witness reside without the limits of the district, or more than thirty miles from the Court House, where the trial is to be had, or is about to remove without the limits of the State before the sitting of the next Court, or his presence cannot be procured by reason of indispensable attendance on some public, official, or professional duty, or of such sickness or infirmity as incapacitates him from travel, he may be examined by commission issuing from the Clerk of the Common Pleas, and under the seal of the Court, and directed to three or more commissioners, authorizing them or any two of them to take the deposition of the witness unable to attend.[c] The practice in obtaining the commission is as follows: A copy of the interrogatories to be propounded to the witness, is served upon the adverse party to the suit, or his attorney accompanied by written notice that in ten days application will be made to the Clerk of Court for a commission. It is customary to furnish the adverse party at the same time with the names of the parties selected as commissioners, so as to enable him to object to them if necessary. The notice must be served personally on the party or his attorney; leaving a copy in analogy to service of process, is not sufficient.[d] To the inter-

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[a] McLeod vs. Rogers, 2 Rich , 21; Darby vs. Huffman, Ibid., 533.

[b] Johnson vs. Wideman, Dudley, 71

[c] Act of 1839, 11 Stat., 75.

[d] Gooday vs. Corlies, 1 Strob., 201.

rogatories thus served, the adverse party puts in cross interrogatories, furnishing at the same time the names of the commissioners, selected by him.[a] At the expiration of the ten days the party seeking the commission makes application to the Clerk accompanying it by affidavit as to the materiality of the witness and the reasons why his attendance cannot be obtained, and by proof that the adverse party has had the requisite notice.[b] The adverse party has the right to show cause before the Clerk why the application should not be granted. But this right is limited, *it is presumed*, to contesting the facts set forth in the affidavit, or the competency of the commissioners, for if the objection touches the competency of the witness or the relevancy or admissibility of the questions propounded, the objection is properly made when the commission comes to be read at the trial. It is proper, however, when either party objects to the questions propounded by his adversary, that the objection be noted at the time on the interrogatories.[c] The commission being granted and signed and sealed by the Clerk, the interrogatories, cross interrogatories and interrogatories in reply, together with all such papers as are to be read to the witness, or are referred to in the interrogatories, are to be attached to the commission, which is then ready to be sent forward to the commissioners.

Notwithstanding, however, the issuing, execution and return of the commission, if it is found that the witness examined is within the district or nor more than thirty miles from the Court House where the trial is to be had, either party may, on two days' notice given, obtain a rule to compel his personal attendance.[d]

With regard to the mode of executing the commission, the printed instructions endorsed on the commission are so full and accurate that little need be said. The commission should be executed by at least two of the commissioners, although it seems by the case of Mosely vs. Graydon, 4

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[a] Dogan vs. Ashby, 1 Strob., 436.
[b] Gooday vs. Corlies, 1 Strob., 201.
[c] Teague vs. S. C. R. R. Co., 8 Rich., 155.
[d] Act of 1839, 11 Stat., page 75.

Strob., 7, that a commission may under peculiar circumstances be validly executed by one; but since the case of Dogan vs. Ashby, 1 Strob., 436, directing the Clerk to see that commissioners representing each party are named in the commission, no difficulty can arise except from the default of one of the parties to the suit.

If the commission is to be executed in a foreign country, and the answers to the questions are in a foreign language, it is *advisable* that a sworn translation of the answers accompany the return of the commission, simply as a test of the translation made by the interpreter before the Court.[a]

When commissions issue from any Court of any other of the United States, or from any Court in this State, to examine a witness, the commissioners in order to obtain the attendance of the witness before them, shall produce the commission to a Judge of the Supreme or County Court, who, on being satisfied of its regularity and authenticity, shall direct a *subpœna* to issue from the Clerk's office of the nearest Court of Common Pleas, requiring the witness to attend before the commissioners at a certain time, and at some place not exceeding fifteen miles from the residence of the witness, and the *subpœna* shall be served on the witness personally at least two days before the time at which he is required to attend, and if the witness fails to attend, or attending, refuses to answer, an attachment against him for contempt may be had from the Courts, and he shall be liable in like manner as a witness subpœnaed and refusing to attend a Court of record of the State.[b] What process the commissioners may employ to procure the attendance of the witnesses when the commission issues from Great Britain or any of the Continental States, does not appear. No provision being made for such cases, as far as I can perceive.

The evidence being in Court, and the case called, the plaintiff opens his case by briefly stating to the Court and jury the matters complained of, his legal rights in the case,

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[a] Kuhtman vs. Brown & Goldsmith, 4 Rich., 479. [b] Act of 1794, 5 Stat., 248.

and the facts he relies on to sustain them; and he then introduces his testimony producing in the first instance, everything material to support his case. The defendant next offers all his evidence in defence and the plaintiff replies, introducing no new matter, but simply restricting himself to the introduction of evidence to meet the case made by the defendant's testimony.[a]

If at the close of the plaintiff's case he has not proved his cause of action and right to redress, the defendant's counsel, in lieu of introducing evidence, may move for a nonsuit; or the plaintiff's counsel, if himself satisfied that he has failed to make out his case, may voluntarily submit to a nonsuit so as to prevent the defendant from taking a verdict, the effect of which would be to conclude the matter. A nonsuit merely puts a stop to the present proceeding, leaving the plaintiff at full liberty to begin *de novo*. The Court, however, proceed with great caution in granting a nonsuit in *invitum*.[b] If the plaintiff omits to call a witness present in Court to testify to a fact necessary to maintain the action, either through accident or an impression that formal evidence of that fact is not essential, it is in the discretion of the Court to permit him to introduce it even though a nonsuit has been moved for, argued and determined against him.[c] After the defendant has submitted his case to a jury, by giving evidence and permitting them to retire, he cannot then move for a nonsuit;[d] but a plaintiff may at any time before the jury have published their verdict, abandon his case and submit to nonsuit.[e]

Questions sometimes arise at the trial as to who is entitled to the reply in argument. The legitimate scope and object of a reply is to answer the argument of the adverse counsel; but under the latitude permitted by our Courts,

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[a] Caldwell vs. Wilson, 2 Spear, 79; Clinton vs. McKenzie, 5 Strob., 41.

[b] Roger vs. Madden, 2 Bail., 322.

[c] Campbell vs. Ingraham, 1 Mills, 293; Browning vs. Huff, 2 Bail., 174; Poole vs. Mitchell, 1 Hill, 404.

[d] McEwen, vs. Mazyck & Bell, 3 Rich., 215.

[e] Lawrin vs. Hanks, 3 McC., 558.

the reply has none of the characteristics of a reply, but is in effect the leading speech in the cause, which the adverse counsel can neither anticipate nor reply to. This marked difference between the English practice and ours, as to the limits of a reply, has materially enhanced its value with us, and sacrifices are made to obtain it, which not unfrequently hazard the success of the cause. The general rule is, that if the defendant introduce evidence, the plaintiff is entitled as of right to the reply, and calling back plaintiff's witness, or offering and reading in evidence a letter, the handwriting of which is admitted, is such an introduction of evidence, as destroys defendant's right to the reply, (Hagood vs. Cathcart, Rice, 264; Hamilton vs. Feemster, 4 Rich., 576.) If the defendant introduces no evidence, or admit the plaintiff's case, and takes upon himself the burthen of proof, he is then entitled to open and reply;[a] but the admission of plaintiff's right of action must be entered upon the record.[b] When there are several issues, some of which are to be proved by the plaintiff, and others by the defendant, the plaintiff is entitled to the general reply, both in evidence and argument.[c]

The case having been argued and submitted to the jury, and verdict found and published, it only remains in order to complete the proceedings, to enter up the judgment. This is done on the rising of the Court, see 11th Rule of Court. The object of this rule is to equalize the liens of all judgments obtained at the same term, and to prevent chance or the accidental position of a case on the docket from giving a priority of lien. The rule only applies to cases where the *judgment of the Court* has been had, for if the defendant has confessed judgment, whether in term time or in vacation, the plaintiff may enter up judgment, and issue execution immediately; it is immaterial whether the case on which judgment is confessed is on the docket, or not.[d]

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[a] 62d Rule of Court.

[b] Gray vs. Cottrell, 1 Hill, 38; Johnson vs. Wideman, Dudley, 326; See also Moses vs. Gatewood, 5 Rich., 234.

[c] Anonymous, 1 Hill, 257.

[d] Bank vs. Magrath, 2 Spear, 305.

If the judgment is not entered up at the rising of the Court, as provided for in the 11th Rule, it may be entered up on or before the last day of the term next succeeding, (Rule 10,) and the entry of the judgment thus made, relates back to the term at which the judgment was had, and as *between the parties* is considered as if made during that term; as between judgment creditors of the defendant, the judgment takes effect from the date of the entry.[a] If the judgment is not entered up before the expiration of the second term, it cannot afterwards be entered up without giving a term's notice to the adverse party, or his attorney of his intention so to do.[b]

If the action is on a penal Bond the judgment is entered up for penalty, and the execution following the judgment expresses the same sum; there is endorsed, however, on the execution a memorandum showing the true amount due on the bond. In all other cases the judgment is entered up for the amount found to be due by the verdict of the jury, or the assessment of the Clerk.

It is proper here to advert to the practice, in case either party dies pending the suit, and

1st. *Where the death occurs prior to interlocutory judgment had.* If the action is by a sole plaintiff, or against a sole defendant, the action abates by the death; but if the cause of action survives, the action may be brought by or against the personal representatives of the deceased. But where there are two or more plaintiffs or defendants, and one or more of them die, if the cause of action survive to the surviving plaintiff, or against the surviving defendants, the action shall not abate, but the death being suggested on the record, the suit may proceed for or against the survivors.[c]

2d. *Where the death occurs after interlocutory judgment, but before assessment of damages.* If the action could have been

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[a] See Dibble vs. Taylor, 2 Spear, 312; Miller & Leekie vs. Jones, 2 Rich., 393.

[b] 10th Rule of Court.

[c] Act of 1746, 7 Stat., 193; Boylston vs. Cordes, 4 McC., 144; Chapman vs. Maryant, 2 Spear, 485.

originally prosecuted by or against the executor or administrators of the deceased, the action shall not abate, but a *sci. fa.* shall be issued by or against the personal representatives of the deceased, to show cause why the damages should not be assessed and recovered; and if the defendant or his representatives, (as the case may be) do not appear, two successive writs of *sci. fa.* being issued, or appearing, fail to show cause, a writ of inquiry shall be awarded and executed, and final judgment entered up,[a] for or against the executors or administrators themselves, and not for or against the original parties. The object of the *sci. fa.* being to make the representatives, parties to the suit, in the place of their decedent.[b]

The interlocutory judgment spoken of in the Act of 1746, means nothing more than the order for judgment on default either of appearance or plea.[c] It may be well to note that the final judgment entered up as above stated, does not rank as a judgment in the administration of the deceased's estate, for the debts of the deceased are to be paid according to the rank which they occupied at his death, and an interlocutory judgment not being a judgment, but merely an authority to have the plaintiff's damages assessed, must be placed in the rank which it occupies as a cause of action, not yet come to judgment.[d]

After entering up the judgment, and before issuing execution, a second *sci. fa.* is necessary to give the executors or administrators an opportunity to plead no assets, or other matter, in their defence.[e]

3d. *Where either party dies after assessment of damages, and before final judgment entered.* In such case, no *sci. fa.* is necessary, for as soon as the verdict has been rendered, writ of inquiry executed, assessment made by the Clerk, judgment upon demurrer or decree in *sum. pro.* pronounced, the

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[a] Act of 1746, 7 Stat., 193.

[b] Thomas vs. McElwee, 3 Strob., 133; Godbold vs. Gordon, 11 Rich., 36.

[c] Dubose vs. Dubose, Cheves 30; Kincaid vs. Blake, 1 Bail, 20.

[d] Thomas vs. McElwee, 3 Strob., 135.

[e] Dibble vs. Taylor, 2 Spear, 313.

final consideration of the Court has been had, and nothing remains but the formal entry of the judgment which is made, as if the party were alive.[a] The judgment may be entered up at any time during the vacation, and since our Rule of Court (11), prescribing the last day of the term as the day of entry of judgments, in lieu of the first, as by the English practice, the vacation doubtless extends to the last day of the term following the final order, and during such vacation, no *sci. fa.* is necessary to have execution against the defendant.[b] If the plaintiff allow the vacation to pass without entering up the judgment, he cannot afterwards enter it up and issue execution without first serving a *sci. fa.* upon the executors or administrators, to show cause why execution should not issue—for by the lapse of time, the execution cannot be tested as in the lifetime of the defendant—and where execution must bear test as of a day subsequent to the date of defendant's death, then *sci. fa.* is necessary to its issuing. It is only when the execution may be tested as in the lifetime of defendant that a *sci. fa.* is unnecessary.[c]

4th. *Where either party dies after final judgment entered up, but before execution issued.* The only question that can arise is as to the issuing of the execution, and that will be governed by the rules already prescribed for the entry of judgment, when the party dies after assessment of damages, and before final judgment entered.

If either party is dissatisfied with the verdict of the jury, or the ruling of the Judge, he is entitled to an appeal which is secured by serving the Judge and opposite counsel on the day after the decision of the cause, with a notice of the grounds on which he appeals, but the successful party is at liberty, notwithstanding the appeal, to enter up judgment and lodge execution to bind the property. Rules of Court 64 and 77.

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[a] Dibble vs. Taylor, 2 Spear, 312; Miller & Leckie vs. Jones, Ibid., 319.

[b] Dibble vs. Taylor, 2 Spear, 314, overruling Verdier vs. Fishburne, 1 Spear, 348.

[c] Ibid.

The 8 § of the Act of 1856, (12 Stat., 489,) passed for the purpose of preventing frivolous appeals, allows the appeal to operate as a stay of execution, only in cases where the Judge grants an order for the stay of execution, or the appellant gives bond. This Act only applies, however, to Charleston district.

Somewhat has already been said as to execution under certain circumstances, but the general practice as to the issuing and renewal of executions, remains to be treated of. At common law, the plaintiff could not issue his execution after the expiration of a year and a day from the signing of the judgment, without reviving the judgment by *sci. fa.;* but by our Acts of 1815, 6 Stat., 5; and 1827, 6 Stat., 324, it is provided that execution can issue at any time within three years next after the signing or enrolment of the judgment, and has active energy without renewal, from the time it is lodged until the regular term of the Court, which shall follow next after the full completion of four years from its lodgment. At any time within those four years, it may be renewed without costs, and at any time within three years from the expiration of its active energy, it may be renewed for four years longer, on payment of costs of renewal.[a] The plaintiff is not restricted to the renewal of the execution first sued out, but may issue a *ca. sa.* as a renewal of a *fi. fa.*, or *vice versa.*[b] It is, however, provided by the Act of 1839, (11 Stat., 76, § 19,) that the Clerk shall not affix the seal of the Court to any renewed execution, unless the one previously issued, shall have been delivered up, or unless authorized so to do by a Judge's order.

It may happen that the defendant does not reside or own property in the district in which the judgment is rendered; in that case the execution, instead of being delivered to the Sheriff of the district in which the judgment is had, should be sent to the Sheriff of the district in which defendant *resides*, or his property is to be found, and is executed by

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[a] See Ancrum vs. Sloan, 1 Rich., 421; Carlton vs. Felder, 6 Rich. Eq., 66.

[b] Robertson vs. Shannon, 2 Strob., 434; Douglas vs. Owens, 5 Rich., 534.

the Sheriff of that district who makes his return to the Court whence the process issued, (Act of 1799, 7 Stat., 294; Act of 1785, 7 Stat., 230; Rule 12,) for as has already been seen, process of the Superior Court of the State runs throughout the State.

The plaintiff has his election to issue *fi. fa.* or *ca. sa.*, or both together; if he elects to issue only one of them, he cannot until the return of that execution, issue the other.[a] If both are taken out together, the Sheriff may proceed *successively* on both, and he need not return a partial levy on the *fi. fa.*, before proceeding on the *ca. sa.;* but as soon as it is ascertained that the levy is insufficient, the Sheriff may either make a further levy, or execute the *ca. sa.*[b] So, too, an arrest under a *ca. sa.* is *prima facie* a satisfaction of the debt, and suspends the lien of the *fi. fa.* pro. tem.; but if the defendant dies or escapes, the lien of the *fi. fa.* is thereby revived.[c]

But it may happen that the plaintiff is unwilling to press his debtor, but at the same time is desirous of preserving his lien and its priority; in such case it is proper to lodge the execution (*fi. fa.*) with the Sheriff, endorsing on it the words "wait orders," or "to bind." The endorsement only suspends the active energy of the execution, and does not affect its lien; and if a levy is made under a junior execution, the proceeds will go to the older execution, notwithstanding the suspension of its active energy.[d]

SUM. PRO.

To entitle a writ to issue, the cause of action must exceed £20, equivalent to $85 71. For the recovery of that amount,

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[a] Jenkins vs. Mayrant, 3 McC., 560; State vs. Guignard, 1 McC., 176.

[b] Mazyck & Bell vs. Coil, 2 Bail, 101.

[c] Mazyck & Bell vs. Coil, 3 Rich., 236; Sanders vs. McCool, 1 Strob., 22.

[d] Vance vs. Red, 2 Spear, 92; Cooper vs. Scott, 2 McM., 155; Gleenwood vs. Naylor, 1 McC., 414.

or any sum under that, and above $20, the remedy is by summary process, according to the Act of 1768, 7 Stat., 200, which provides "that it may be lawful for the Judges in said Courts, or any of them to determine without a jury in a summary way, on petition, all disputes cognizable in said Courts, for any sum not exceeding £20 sterling, except where the title of lands may come in question." The Act further provides for a trial by jury, when demanded by either party, and that the petition shall contain "the plaintiff's charge or demand plainly and distinctly set forth, a true copy whereof shall be served on the defendant." The practice in *sum. pro.* differs but little from cases commenced by writ. Some few matters, however, require notice, and I shall allude to them in order, as they regard the jurisdiction, the pleadings, the interrogatories, and the judgment. The jurisdiction, as has been seen, comprises all sums over $20, and up to $85 71, inclusive. If the cause of action exceeds this last mentioned sum, the Court cannot entertain jurisdiction of it, and plaintiff cannot release part of his debt, or the defendant part of his discount, in order to bring the amount due within the *sum. pro.* jurisdiction of the Court.[a] It is immaterial whether the excess is caused by the amount of the demand, or by the interest accruing on it; it is in either event beyond the jurisdiction.[b] Where, however, the plaintiff sues on a note originally within the jurisdiction, but the interest accruing since the commencement of the suit swells it beyond the jurisdiction, the plaintiff may either take judgment to the extent of the jurisdiction, or he may declare, and transfer the cause to the general jurisdiction.[c] If the suit is on a note or other cause of action, originally beyond the jurisdiction, but reduced within it by payments or credits, it is for the defendant to show that the receipts or credits are colorable.[d] If the action is on a bond, and the condition is within the *sum. pro.* jurisdiction, the plaintiff may sue on

[a] Simpson vs. McMillion, 1 N. & McC., 192; Bents vs. Graves, 3 McC., 280.
[b] 1 N. & McC., 192.
[c] Gracy & Co. vs. Wright, 2 McC., 278; Taylor vs. Purvis, 1 Hill, 373.
[d] Fiske ads. Guerard, 2 McC., 11; Taylor vs. Purvis, 1 Hill, 373.

the condition, notwithstanding the penalty exceeds the jurisdiction;[a] so, too, where the action is on an official bond, and the damages laid are within the jurisdiction, the suit may be brought by summary process, regardless of the penalty.[b] If the defendant in *sum. pro.* has a discount which exceeds the summary jurisdiction, the Court on being satisfied of the merits, will order the plaintiff to declare in the higher jurisdiction, to enable the defendant to set up his discount;[c] but the Court will not make the order, unless injustice would be done by refusing the motion, or the law prohibits the discount set up from being tried in that jurisdiction, as *e. g.*, where the discount involves the title to land, which by the Act is exempted from *sum. pro.* jurisdiction.[d]

The plaintiff in *sum. pro.* may insert in his petition several counts upon the same cause of action, and it is immaterial that the aggregate amounts exceed the jurisdiction, provided no single count does, but if evidence is given of a debt beyond the jurisdiction, the plaintiff must fail.[e] So, too, the plaintiff may join in the same petition several distinct causes of action of the same nature, provided the aggregate does not exceed the *sum. pro.* jurisdiction.

Where the plaintiff's demand has been reduced below the *sum. pro.* jurisdiction by discounts, or by payments made *after* suit commenced, the practice is to give a decree for the balance due.[f] In all other cases *ex contractu*, if the debt is reduced below the *sum. pro.* jurisdiction, a nonsuit should be ordered by the Circuit Court.[g]

The Act, it will be observed, simply requires that the "Petition shall contain the plaintiff's charge or demand,

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[a] Lynch vs. Crocker, 2 Bail., 313.

[b] Treasurers vs. Walker, 2 Hill, 629.

[c] Beckham & Eckles vs. Peay, 1 Bail., 121.

[d] Executors of Lindsay vs. Lindsay, 1 McC., 490; Simpson ads. Knox, 2 Spear, 632.

[e] Lee vs. Foot, 2 Bail., 112.

[f] Steamer St. Matthews vs. Mordecai, 1 McM., 296; Vaughan vs. Cade, 2 Rich., 49; Caldwell vs. Garmany, 3 Hill, 203.

[g] Owens vs. Curry, 3 Strob., 262, overruling Vaughan vs. Cade, 2 Rich., 49; Goodwin vs. Lake, 2 Rich., 565, and other cases authorizing verdict for defendant under similar circumstances.

plainly and distinctly set forth," and technical precision is not necessary; it is essential, however, that the cause of action should be set out with sufficient certainty to prevent a surprise on the defendant;[a] and as a copy of every deed, bond, open account, or other writing declared on, must be annexed to, or endorsed not only on the original petition, but also on the copy served on defendant,[b] a very slight degree of attention will prevent uncertainty in the statement of the cause of action. If the body of the process sets forth the cause of action, specifically, no copy or bill of particulars need be added.[c]

If the suit is against an endorser, it is sufficient to state that the defendant is indebted as endorser, and a formal averment of demand on, and refusal by the maker, and notice to the endorser is unnecessary.[d] If on a former judgment, or on a foreign judgment, the plaintiff must annex a copy of the judgment both on the original and the copy petition.[e]

If the plaintiff relies on a specific promise distinct from a general assumpsit, he must set it forth in his process or evidence of it cannot be admitted.[f] So, too, if there is a special defence to the action, it must be specially pleaded, for notwithstanding the latitude allowed in the *sum. pro.* jurisdiction, special matters of defence cannot be given in evidence under the general issue.[g]

The distinctive feature of the *sum. pro.* jurisdiction is the right which either party has to purge the conscience of his adversary by a short-hand bill of discovery. The 34th Rule of Court provides that "if the plaintiff shall desire to have the benefit of the defendant's oath, he shall state in writing the points to which he shall require his oath, and serve him with a copy thereof, with notice of such intention, at least

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[a] Parker vs. Martin, 1 Bail., 138.
[b] 35th Rule of Court.
[c] Hagood vs. Mitchell, 1 Bail., 124.
[d] Hilburn vs. Paysinger, 1 Bail., 97.
[e] Bailey vs. Wilson, 1 Bail., 15; Parker vs. Martin, Ibid, 138.
[f] McDaniel vs. Scoggins, 2 Mills, 227.
[g] Bailey vs. Wilson, 1 Bail., 15.

one day before the hearing of the cause, and the defendant may either give his answer in writing, sworn to before the Clerk, or *ore tenus* in open Court. And if a defendant shall desire the benefit of the plaintiff's oath, he shall proceed to require it in the same manner." If either party is absent from the State, and his evidence is material, the Court will grant a term's delay, that a commission may issue to examine him.

The Rule once was as laid down in Wallace & Welbourn vs. Norrell, 1 Bail., 125, that a party in summary process cannot compel the opposite party to answer interrogatories if it appears that there exist legal evidence of the matter enquired of. That Rule is now changed and the existence or absence of other legal evidence does not seem to affect the right of a party to compel the opposite party to answer interrogatories.[a] If the party on whom the interrogatories are served, fails to answer, the matters may be taken against him *pro confesso*.[b] In general the party serving interrogatories to be considered as in equity, seeking a discovery, and to be governed by the Rules of equity pleading, and, accordingly, where to an action the plea is the statute of limitations, the defendant cannot be asked if he has not subsequently promised to pay the debt.[c] But where the plaintiff served interrogatories, and the defendant filed his answer with the Clerk, the plaintiff may, nevertheless, decline to offer the answer, and rely upon other evidence to establish his claim;[d] if, however, he uses the answer to the interrogatories, he must rely upon that alone and cannot resort to other evidence.[e] If the defendant, in lieu of written responses, answers *ore tenus*, he can only be required to answer to the matters propounded in the interrogatories, and cannot be cross examined by his own counsel.[f]

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[a] Brown vs. Stroud, 8 Rich., 292; Harrison vs. Dodson, 11 Rich., 48.

[b] Walker vs. Mathaney, Harp., 187; Roche vs. Chaplin, 1 Bail., 276; Fillmore & Gamble vs. Cockfield, 2 Bail., 446; Brown vs. Stroud, 8 Rich., 292.

[c] Holly vs. Thurston, Rice, 282; Lewis vs. Kemp., 6 Rich., 515.

[d] Henkin vs. Gramman, 2 Rich., 365.

[e] Harrison vs. Dodson, 11 Rich., 48.

[f] Hill vs. Denny, 1 Strob., 338.

The interrogatories must be served personally upon the party to the record. Service upon the attorney, even though the principal is absent from the State, is insufficient.[a]

It is not usual to enter up judgment on summary process, in regular form. The presiding Judge enters an order for a decree on the Docket, from whence the Clerk enters the decree on the minutes of the Court. And that is the only judgment ever entered up, and is sufficient.[b] The entry of the decree on the minutes is the judgment, and where from any cause the Clerk has failed to enter the decree on the minutes, there is no judgment, nor will a motion to amend by entering up judgment *nunc pro tunc* be granted, for there is nothing to amend by, their being no evidence of a judgment.[c] If, however, the judgment is by confession during vacation, then the confession endorsed on the process and signed by the defendant, is, it seems, a sufficient judgment in such case.[d]

BAIL.

Having sketched the progress of a suit from its inception to its termination, I must now retrace my steps for a moment, to allude to matters connected with the commencement of a suit, which could not be treated of previously without some confusion. So far the defendant has been brought into Court by the service upon him of the ordinary *capias ad respondendum*, but the plaintiff may desire to have some security for the defendant's appearance, to answer the charge. This is accomplished by means of a Bail Writ, and as the law and practice in matters of bail in this State differ widely from those of the English Courts, it is neces-

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[a] Bartoline vs. Heath, 2 Bail., 196.

[b] Gage vs. Santon, 2 Mills, 247; Foster vs. Chapman, 4 McC., 291.

[c] McCall vs. Boatwright, 2 Hill, 438; Brown vs. Coward, 3 Hill, 4; Evans vs. Hind, 1 McM., 493.

[d] Manning vs. Dove, 10 Rich., 395.

sary to be a little more minute in our investigation, than comports strictly with the design of this sketch.

According to the English law, bail is either common or special. It is also further divided into bail to the Sheriff and bail to the action. Common bail, whether to the Sheriff or to the action, obtains only in matters of small importance, and consists of mere imaginary persons—the John Doe and Richard Roe of legal notoriety. But if the plaintiff will make affidavit that the cause of action amounts to £20 or upwards, then he may have the defendant arrested, and committed to jail for safe custody, or compel him to put in substantial sureties for his appearance at the return of the writ. This is called Special Bail to the Sheriff, or bail below, and the bond to the Sheriff is a Bail Bond.

On the return of the writ, the defendant must appear, and the appearance is effected by putting in bail to the action. This is done by two or more substantial sureties entering into recognizance that the defendant, if condemned in the action, will pay the costs and condemnation, or render himself a prisoner, or that they will pay it for him. This is a special bail to the action, or bail above, and the recognizance entered into is styled a Bail piece.

If the defendant, having given bail to the Sheriff, fails to put in special bail to the action, the plaintiff may discontinue his proceedings against the defendant, who by his failure to put in bail to the action, is not entitled to enter appearance, and therefore not a party in Court, and take an assignment from the Sheriff of the bail bond, and proceed against the bail, or if they are insolvent, he may proceed against the Sheriff for a breach of duty in taking an insufficient bond.

Such was the law and practice of this State until the Act of 1785, 7 Stat., 215. A prior Act, that of 1769, (P. L. 273,) had provided that "no person, except transient persons, shall hereafter be held to bail for any sum less than £50 current money, ($30 61-100—see 2 McC., 385,) and no person shall be held to bail for debt unless an affidavit shall

be made before, and attested by, some Judge or Justice of the Peace, and endorsed on, or annexed to, the writ. The 10 § of the Act of 1785, reciting the practice that obtained in the State of permitting the plaintiff, (on default of defendant to appear,) to discontinue proceedings against the defendant, and commence fresh actions against the bail, *enacted* that where the defendant gives bail for his appearance, and makes default, the suit shall be prosecuted to judgment and execution against the defendant, before any proceeding shall be had against the *common* bail; and if the Sheriff shall return *non est inventus* or *nulla bona* on executions against the defendant, the plaintiff may have *sci. fa.* against the Bail, to show cause why execution for judgment and costs should not issue against them. Provided, that nothing herein contained shall be construed to deprive the *common* bail in such actions from appearing and entering himself special bail, at any time before judgment in such action shall be signed.

This clause of the Act of 1785, introduced the following alterations in the old law: [a]

1st. It gave the name of Common Bail to the bail to the Sheriff, and applied the term Special Bail exclusively to bail to the action.

2d. It required the plaintiff to prosecute his action to judgment and execution against the defendant, before he could resort to the bail.

3d. It gave the common bail the privilege of appearing and entering himself special bail, at any time before final judgment against the defendant.

4th. It authorized the plaintiff to proceed against the bail by *scire facias* instead of bringing an action on the bond—the former remedy by action on the bond still, however, remaining unimpaired by the Act.[b]

By the Act of 1809, (7 Stat., 309,) the distinction between common and special bail was still further obliterated, and may now be considered as entirely destroyed except in the

[a] Pepoon vs. Mooney, 1 Mills, 314, and Judge Nott's Lecture on Bail, Appendix to 3 Strob., 617.

[b] Quatermas ads. Hawkins, 1 N. & McC., 323.

single instance of bail for a woman.[a] That Act provides that the bail to the Sheriff (the common bail according to the Act of 1785,) shall be entitled to all the rights, privileges and powers of special bail, and may surrender his principal in discharge of himself, or the principal surrender himself in discharge of his bail in the same manner and to the same extent as special bail are now entitled to; and further that "the bail need not obtain a Judge's order for leave to surrender his principal."

Having shown the Statute law on the subject, I proceed to the practice. The plaintiff, if desirous of holding the defendant to bail in an action arising on a contract, must endorse on or annex to the writ an affidavit, setting forth the amount really due, and the nature of the debt or demand.[b] The office of the affidavit is to furnish reasonable proof of the nature, amount and justice of the debt, first to enable the Court to see that the plaintiff has a good legal cause of action, for a sum certain before a citizen is by legal process deprived of his liberty; and second, to inform the defendant of the claim, so as to enable him to admit its justice and pay it, or to contest it by giving bail and defending the action.[c] It is proper, therefore, to set forth in the affidavit, concisely but clearly, the nature and amount of the debt. If on promissory note or bill of exchange, state the date and place of making, how, where and when payable, the amount and the nature of the defendant's liability on the paper whether as maker, drawer, acceptor or indorser. An affidavit setting forth simply that defendant was indebted to the plaintiff in the sum of $145 on a promissory note bearing date June 14, 1852, has been held sufficient;[d] but it is proper to avoid the possibility of error by making the affidavit concisely full and explicit. If for goods sold and delivered, state the indebtedness as for goods sold and deliv-

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[a] Ancrum vs. Sloan, 1 Rich., 422.

[b] Peck & Hood vs. Van Evour, 1 N. & McC., 580; Note, Brisac vs. Moorer, Dudley, 229.

[c] Sanders vs. Hughes, 2 Bail., 506.

[d] Rosenberg vs. McKaim, 3 Rich., 148; Tobias vs. Wood, 1 McM., 103.

ered, and in like manner through the various money counts in assumpsit, and close the affidavit with a general averment that the said debt remains wholly unpaid, and is still due and owing to the said plaintiff.

In general the affidavit should be made by the plaintiff himself, and be decided and positive in stating the existence of the debt; but if the plaintiff resides beyond the State the affidavit may be made by his agent, and to the effect that he is informed and believes that the defendant is indebted to the plaintiff, &c. So too, if plaintiff sues in *autre droit*, the affidavit need only be as to his belief and information. When the plaintiff is beyond the State, the affidavit may (it is presumed), be made by the attorney in the case, or his agent.[a] The affidavit being endorsed on or attached to the writ, the writ is endorsed, "take bail, see affidavit annexed," and is ready for the Sheriff.

If the cause of action arises *ex delicto*, or for any other cause than debt, the plaintiff must swear to the circumstances of the case and obtain a special order for bail from a Judge or Commissioner of special bail, specifying the sum in which the defendant is to be bound.[b] Every Clerk of Court is *ex-officio* a Commissioner of special bail,[c] and where the Clerk cannot act, from sickness, absence, or interest, any magistrate is authorized to act as Commissioner.[d] The order for bail is all that need be endorsed on the writ and the affidavit, on which the order was granted, need not appear.[e] When the requisites above set forth are complied with, it is the duty of the Sheriff to arrest the defendant and commit him to jail, or to take a good and sufficient bail bond.

If the affidavit upon which the defendant has been held to bail is defective, the proper method of taking advantage of it, is for the defendant to move at the return term of the

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[a] Treasurers vs. Barksdale, 1 Hill, 272; Kerr vs. Phillips, 2 Rich., 199.

[b] Act of 1768, § 20, 7 Stat., 204; for form of order see Miller's Compilation, p. 170.

[c] Act of 1839, 11 Stat., 78, § 32.

[d] Act of 1839, 11 Stat., 20, § 21.

[e] Brissac vs. Moorer, Dudley, 231.

writ, to enter an *exoneretur* on the bail bond. After plea and judgment the defendant will not be allowed to object to any irregularity in the affidavit; nor can the bail object when the principal himself is precluded,[a] for the rule requiring the cause of action to be set forth in the affidavit is merely a rule of practice adopted by the Court for the protection of the liberty of the citizen, and does not extend to protect the bail. The bail may, however, take advantage of any matter which renders the order for bail absolutely void. So, too, the bail may have an *exoneretur* entered on the bail bond if there is a variance between the affidavit and the bond, on making affidavit that he was ignorant that the cause of action declared on was the one intended to be embraced in the affidavit; that he executed the bail bond, believing the cause of action was different from the one set out in the declaration, and that he has sustained some injury or prejudice thereby. (76th Rule of Court.) The variance to entitle the bail to have the *exoneretur* entered, "must be by declaring on a totally distinct cause of action from that stated in the affidavit. If there is no cause of action stated in the affidavit there can be no variance."[b] In such case if the principal plead to the original action, there is no redress for the bail, for there is no variance to be taken advantage of; and the principal having waived the objection by pleading, the bail is estopped also. The case of Sanders vs. Hughes, already noticed, prescribes the practice afterwards established in the 76th Rule of Court.

Having shown the manner of obtaining bail, it may not be altogether superfluous to glance at the liability incurred by the bail, and the time when that liability becomes fixed.

The undertaking of the bail is in the triple alternative as has been already stated, viz: that the defendant if condemned, will pay the costs and condemnation, or surrender himself, or that they will pay it for him.

The Act of 1785, (7 Stat., 215,) commands the plaintiff to prosecute his suit to judgment, and issue execution against

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[a] Sanders vs. Hughes, 2 Bail., 506. [b] Sanders vs. Hughes, 2 Bail., 510.

the defendant, and gives him the right to proceed against the bail only on *non est inventus*, or *nulla bona* returned on the executions.

The Act, it will be observed, says, that "if the Sheriff return upon the execution, that the defendant is not to be found, or hath no effects whereon to levy the debt, then the plaintiff may sue forth a *scire facias*." From this it might be inferred that a return of *nulla bona* to a *fi. fa.* would be sufficient to authorize *sci. fa.* against the bail; and such is in fact the rule, where the principal is a female, and cannot, according to the Act of 1824, (6 Stat., 237,) be arrested on *ca. sa.*;[a] but in all other cases the liability of the bail is fixed by the return of *non est inventus* to a *ca. sa.* and no *fi. fa.* need issue.[b]

Simple as the proposition appears to be, that bail are fixed by the return of *non est inventus* to a *ca. sa.*, great difficulty has been experienced in determining when the *ca. sa.* may be returned, so as to fix the bail. It was the opinion of Judge Richardson in Davitt vs. Counsel, 2 N. & McC., 137, that the *ca. sa.* could not be returned for the purpose of fixing bail until the return day of process, which by the Act of 1799, was fifteen days before the sitting of the Court; and to the same effect is the opinion of Judge Johnson in Sanders vs. Bobo, 2 Bail., 492, whilst on the other hand, Judge O'Neall intimated in Sanders vs. Hughes, 2 Bail., 513, that the *ca. sa.* need only remain in the Sheriff's office sufficiently long enough to enable that officer to satisfy himself that the defendant was not in his bailiwick, and that upon the return of *non est inventus*, the plaintiff might proceed forthwith against the bail. The law thus remained unsettled, until the case of Anerum vs. Sloan, 1 Rich., 421, when the point directly arose, and necessitated a construction of the Act of 1827, 6 Stat., 324. By that Act, executions were thenceforth made "returnable according to law," instead of to a fixed day as previously. The second section of the Act

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[a] See Jarvis vs. Gilberson, Dudley, 223; Jarvis vs. Alexander, Cheves, 147.

[b] Broadus vs. Welsh & Carter, 2 N. & McC., 569; see also Jarvis vs. Alexander, Cheves, 147.

also provided that "the Sheriff shall at each regular term of the Court, during the active energy of the execution, return the manner in which he has executed the process, and the return of the said officer made as aforesaid, shall for the fixing of bail, have the same legal effect as if the process had been made returnable to the term succeeding its first lodgment;" and the Court held that a return of *non est inventus* could not be made on a *ca. sa.*, so as to fix the liability of the bail before the return day of the *ca. sa.*, which return day was the first day of the term succeeding its first lodgment with the Sheriff;[a] and as the whole term is in contemplation of law indivisible, and but a single day,[b] the bail cannot be fixed until the close of the return term of the *ca. sa.;* and during the whole of that term the bail may *de jure* surrender their principal in discharge of themselves.[c]

When bail are once fixed, the debt of the principal becomes their debt, and the discharge or death of the principal cannot affect their liability.[d]

Notwithstanding that the bail are fixed by the return of the *ca. sa.*, and their right *de jure* to surrender their principal gone, they still have *ex gratia* a longer time within which they may make the surrender in discharge of themselves.[e] In Davitt vs. Counsel, 2 N. & McC., 137, they were held entitled to the whole of the first term, after service of the writ upon them, or to the return term of the *sci. fa.*, within which to surrender their principal;[f] or such surrender may be made even after *ca. sa.* returned and bail bond assigned, and that without any previous order of the Court; although if made after the return of the *ca. sa.*, an order of Court is necessary to confirm it and give it effect. The reason as given by Judge Wardlaw,[g] is that a render before *ca. sa.* returned, may be pleaded in bar of plaintiff's action against

[a] Anerum vs. Sloan, 1 Rich., 421.

[b] Sanders vs. Bobo, 2 Bail., 494.

[c] Glover vs. Gomillion, 2 Rich., 555; Watson vs. Bancroft, 4 Strob., 218.

[d] Sanders vs. Bobo, 2 Bail., 492; Gordon and Spring vs. Liepman, 3 McC., 49.

[e] Ibid.

[f] See also Sanders vs. Hughes, 2 Bail., 514; and Glover vs. Gomillion, 2 Rich., 557.

[g] Glover vs. Gomillion, 2 Rich., 557.

the bail; but by the return of the *ca. sa.*, the liability of the bail is fixed, and the surrender after such return is *ex gratia*, and cannot be pleaded in bar, but must be made effective by a Judge's order showing that the indulgence of the Court had been granted. The explanation shows the necessity of an order, and the order is permitted to be subsequent, out of indulgence to the bail.

In Watson vs. Bancroft,[a] the Court advanced one step further, and considered the right of the bail to surrender their principal at any time within the term to which the *sci. fa.* was returnable as a right *de jure*, and not a privilege *ex gratia*, and ordered a discontinuance of proceedings against the bail on payment of costs.[b]

The distinction between the *right* of the bail to surrender their principal, and their privilege to do so *ex gratia*, was thus entirely abolished by this case, but the Court revived the distinction in Breeze vs. Elmore, 4 Rich., 436, by extending the *ex gratia* privilege of the bail, and permitting them at any time before the expiration of the return term of the writ against them, to move for further time within which to surrender their principal.

The law may be thus summed up:

1. The bail are fixed at the expiration of the term to which the *ca. sa.* is returned *non est inventus*.

2. They have the *right* notwithstanding, to surrender their principal at any time before the expiration of the return term of the writ against them.

3. That if unable then to surrender their principal, they may *ex gratia* obtain from the Court further time within which to surrender him.

As to the mode and manner of surrendering the principal, and the precautions necessary to be taken by the bail, see Moyers vs. Center, 2 Strob., 439.

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[a] 4 Strob., 218; see also Breeze vs. Elmore, 4 Rich., 450.

[b] The *ex gratia* privilege being converted into a *right*, is the order of Court now necessary to give effect to the surrender, as in Glover vs. Gomillion?

FOREIGN ATTACHMENT.

The manner of obtaining defendant's appearance in Court, by the coercive influence of a bail writ, has been already shown, but the defendant may be beyond the limits of the State, so that bail process cannot be served him. In such case, the plaintiff is provided with a remedy by the Attachment Law of the State, which enables him to attach the property of the defendant, in whosoever hands it may be, so as to compel his appearance in Court, as a party, or subject his effects to the operation of a judgment.

The Attachment Writ exists with us purely by virtue of legislative enactment, but the practice relative to it has been moulded by the decisions of our Courts to a greater or less degree of conformity to the custom of London. This has introduced some complexity in our law, and for a better examination of the subject, I propose to treat

1st. When the attachment may issue;

2d. What may be attached;

3d. The practice in Attachments.

1st. The plaintiff is entitled to sue out a writ of Attachment when the party sought to be made defendant resides, or is, without the limits of the State, and is liable to the plaintiff on "any judgment bond, bill, note of hand, book debt, covenant, contract, or assumpsit, whatsoever, or wheresoever made or entered into,"[a] or has committed "any tort trespass or injury to the real or personal property" of the plaintiff;[b] and any debtor absconding or concealing himself, so that process cannot be served upon him for the space of three months, shall be deemed to have departed from the State, and his property liable to attachment.[c] Such are the statutory provisions regulating the right to issue an attachment, and under them the Courts have held that the writ may issue on a judgment before the expiration of a year and a day from the date of its recovery and that,

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[a] Act of 1744, § 1, 3 Stat., 617. [b] Act of 1783, § 2, 4 Stat., 544.
[c] Act of 1751, § 1, 3 Stat., 731.

whether the judgment is of this or of another State.[a] It is true that when the judgment is of this State, the execution can, within the year and day, issue upon the effects of the defendant, but the property may be of that description that a *fi. fa.* cannot act upon it, and the absence of the defendant prevents the execution of a *ca. sa.* by which he might be arrested, and forced on taking the insolvent debtor's Act, to make a schedule and assignment. The writ in attachment alone furnishes a remedy by seizing upon the property, and subjecting it to the payment of defendant's liability on the judgment.

A writ of attachment cannot, however, issue against an absent copartner (on a partnership debt) who has a part resident in the State;[b] nor can it issue to attach the partnership property, even if all the copartners are out of the State, provided the resident copartner has, before leaving, published a notice that he is ready to answer any suit that may be brought against him, or to appear and give bail to the action;[c] for *any* person about to depart, giving notice for one month next before his departure, that he is about to depart, and is ready to answer any suit that shall be brought, exempts his effects from attachment, § 9, 3 Stat., 620; nor can the writ issue against an absent executor or administrator;[d] nor for an action of slander, for the torts, trespasses and injuries spoken of in the Act of 1783, (4 Stat., 544,) must be actually done to the real or personal property of the plaintiff.[e]* It does not embrace injuries to the person or character, and there being no process of outlawry in this State, one committing an assault or publishing a slander or

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[a] Clark vs. Conner, 2 Strob., 346; Shooter vs. McDuffie, 5 Rich., 65.

[b] Bank vs. Broadfoot & McNeill, 4 McC., 30.

[c] Robinson vs. Crouder, Clough & Co., 1 Bail., 185; Act of 1744, § 9, 3 Stat., 620.

[d] Weyman vs. Murdock, Harper, 125.

[e] Sergeant vs. Helmbold, Harper, 219.

* A conversion would hardly appear to be such a tort actually done to property as would entitle plaintiff to Writ of Attachment; but the Writ of Attachment can issue in trover, for otherwise the plaintiff would be deprived of all remedy against the defendant, should he abscond. (See Gilchrist & King vs. Martin & West, 1 Bail. Eq., 493.)

a libel has only to remove beyond the limits of the State to escape punishment.

2d. What may be attached.

The "money, goods, chattles, debts and books of account,"[a] "lands leasehold, estates, and chattles real,"[b] in the hands of any person or persons whatsoever, and the attaching of a part in the name of the whole, that is in such person's hands, power, or possession shall secure and make the whole liable in law to answer any judgment that shall thereafter be recovered upon that process.[c]

Under the words "moneys and debts," is included all debts due by the garnishee to the absent debtor, whether evidenced by bond or note or not; and all securities for money, notes or bonds in suit; but a mere claim for damages which is in course of litigation,[d] or money due on a note given by garnishee to the absent debtor cannot be attached.[e] Nor can moneys levied under *fi. fa.*, and in the Sheriff's hands;[f] or money in the hands of the Ordinary,[g] or in the hands of the United States Marshall,[h] or a legacy, or distributive share of the absent debtor, in the hands of the executor or administrator[i] be subject to attachment. Goods and chattels levied on under *fi. fa.*, and in the Sheriff's hands are, however, subject to attachment.[j] It is not easy to perceive why goods the proceeds of a *fi. fa.*, should be subject to attachment, and the money arising from the sale of these goods exempt, but such is the law. Where, however, after satisfying the *fi. fa.* there remains a balance in the Sheriff's hands, that balance is liable to

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[a] Act of 1744, 3 Stat., 617.

[b] Act of 1783, 4 Stat., 544.

[c] Act of 1744, 3 Stat., 617.

[d] Burrell vs. Letson, 2 Spear, 388.

[e] Gaffney vs. Bradford, 2 Bail., 441.

[f] Blair vs. Canty, 2 Spear, 35; Bowden vs. Schatzell, Bail., Eq., 360.

[g] Murrell & Foote vs. Johnson, 3 Hill, 13.

[h] Burrell vs. Letson, 1 Strob., 245.

[i] Young vs. Young, 2 Hill., 425; McElwee vs. Story, 1 Rich., 9; see also Kinloch vs. Mixer, 1 Spear, Eq., 427; Carlton vs. Felder, 6 Rich., Eq., 58.

[j] Day vs. Beecher, 1 McM., 94.

attachment. It is not considered as in the custody of the law.[a]

Partnership property may be attached for the individual debt of one of the copartners,[b] but all that the plantiff attaches is the individual partner's interest in the property,[c] which interest is the residue after payment of partnership debts, and a judgment creditor of the copartnership has a right to the fund attached, prior to the right of the attaching creditor.[d]

A Court of Law is, however, from its constitution unable to ascertain what is the interest of the absent copartner in the property attached; but the practice of the Court *seems* to be to pay over to the attaching creditor the defendant's proportionate share in the property attached, as one of the joint owners; the attaching creditor giving bond to answer all claims which may be afterwards made on the funds.[e]

3d. The practice in attachment.

The attachment is effected by serving the person in possession of the property of the absent debtor, (if there be any one in possession,) with a copy of the Writ of Attachment, upon which copy is endorsed a notice requiring him to appear before the Judge of the Court of Common Pleas, to show cause why the effects attached should not be adjudged to belong to the absent debtor.

The writ must contain the names of the parties to the suit, and the statement of the cause of action, set forth with the same accuracy as is required in a *capias ad respondendum*. The writ being prepared and the copy writ addressed to the person whom it is intended to serve as garnishee, the plaintiff applies to the Clerk of Court to have the writ tested; and it is the duty of the Clerk before allowing the writ to issue, to take from the plaintiff or his agent, a bond to defendant in double the amount for which

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[a] Dickinson vs. Palmer, 2 Rich. Eq., 407.
[b] Schatzell vs. Bolton, 2 McC., 478.
[c] Knox vs. Schepler, 2 Hill, 595.
[d] Bowden vs. Schatzell, 1 Bail. Eq., 360.
[e] Knox vs. Schepler, 2 Hill, 595; Schatzell vs. Bolton, 2 McC., 478.

the attachment issues, to be answerable for all damages the defendant may sustain, by any illegal conduct in obtaining or prosecuting the same.[a] The penalty of the bond must be double the damages if the action is in assumpsit; if in debt, and the damages nominal, double the debt; if the damages are not nominal, double the debt and damages.[b] The bond may be executed by the attorney at law of the plaintiff, and no special power authorizing him need be produced.[c] The bond given must, however, be in compliance with the attachment law of the State, and a mere blank paper signed and sealed by the plaintiff or his agent, is not a sufficient execution of a bond to authorize the issuing of the writ;[d] but the objection to the regularity, or even to the absence of the bond, can only be made by the absent debtor himself. The garnishee cannot avail himself of it,[e] and even the absent debtor is precluded from taking advantage of it after pleading to the merits.[f] On giving the bond, the writ issues of common right. (Act of 1799, 7 Stat., 294.)

While upon the subject of the writ, it will be as well to notice the causes for which it may be set aside or quashed.

It will be set aside on motion, if shown by affidavits that the defendant was in the State at the time of service of the writ,[g] but if the fact is doubtful the Court will not interfere;[h] or if defendant is not liable to that process,[i] or if the fund is not attached,[j] or if the action is not suiable by attachment,[k] or if the debt is not due,[l] or if bond has not

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[a] Act of 1839, 11 Stat., 76, § 21.

[b] Brown & Stone vs. Whiteford, 4 Rich., 327.

[c] Dillon vs. Watkins, 2 Spear, 447, and Byne vs. Byne, 1 Rich., 441, overruling Myers vs. Lewis, 1 McM., 54.

[d] Boyd vs. Boyd, 2 N. & McC., 125.

[e] Camberford vs. Hall, 3 McC., 345; Wigfall vs. Byne, 1 Rich., 413.

[f] Gray vs. Young, Harper, 38.

[g] Degnau ads. Wheeler & Co., 2 N. & McC., 323; Blake vs. Hawes, 2 Hill, 631.

[h] Shrewsbury vs. Pearson, 1 McC., 331.

[i] Weyman vs. Murdock, Harper, 125.

[j] Burrell vs. Letson, 1 Strob., 244.

[k] Sargeant vs. Helmbold, Harper, 219.

[l] Walker & Bradford vs. Roberts, 4 Rich., 563.

been given.[a] The attachment will not, however, be set aside on the ground that the defendant had in a foreign country, made an assignment of all his effects, prior to the service of the writ.[b]

The motion to set aside the writ may be made by the defendant, or by the junior attaching creditor, but care must be taken to keep steadily in view the distinction between illegality in the proceedings and mere irregularity; for the former, either the defendant or junior attaching creditor may move to set aside the writ; to the latter the defendant alone can except;[c] and even he, as has already been stated, is precluded by pleading over.[d]

The writ being duly tested and the bond given, the writ is delivered to the Sheriff, who must serve it *personally* upon the garnishee. The Act of 1744, (3 Stat., 617,) and the Act of 1839, (11 Stat., 29, § 18,) use the same language that the Sheriff shall "summon the person in whose hands," &c., "by serving such person with a copy," and in Richardson vs. Whitfield, 1 McC., 403, it was held that the service could not be by copy left; and to the same effect is Day vs. Beecher, 1 McM., 94, where a writ lodged in the Sheriff's office, the Sheriff being garnishee was held not to be sufficient service.

If the service of the writ is illegal no lien is created, and although the defendant, by subsequent pleading waive the illegality, the waiver cannot relate back so as to defeat the lien of intermediate attachments.[e]

The first writ of attachment lodged in the Sheriff's office has priority of lien, although a writ subsequently lodged is first served.[f] There can of course, be no lien where there is no service, but where both the attachment writs are

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[a] Chambers & Sadler vs. McKee, 1 Hill, 229.

[b] Crowder, Clough & Co., ads. Robinson, 4 McC., 519.

[c] Lindau vs. Arnold, 4 Strob., 292; Walker & Bradford vs. Roberts, 4 Rich., 566: Camberford vs. Hall, 3 McC., 345: McBride vs. Floyd, 2 Bail., 208; Shooter v. McDuffie, 5 Rich., 61.

[d] Gray vs. Young, Harper, 38.

[e] Gardner vs. Hust, 2 Rich., 601.

[f] Callahan vs. Hallowell, 2 Bay, 8.

served, the priority of lien depends on the priority of lodgment with the Sheriff, and not on the priority of service; and this is in effect the real principle decided by the cases of Crowninshield vs. Strobel & Martin, 2 Brev., 80, and Robertson vs. Forest, Ibid, 466, which at the first glance appear to contradict the case in 2 Bay.

We pass now to the active energy of the writ. The operation of the attachment seems twofold.

1st. As fixing a lien on property visible and known as the property of an absent debtor, whether it be in the possession of any one or not; and

2nd. As a means of obtaining a discovery by the oath of the garnishee, whether or not he has in his possession or power any and what property of the absent debtor, and whether or no he is in any manner indebted to the absent debtor.[a] An examination of the the various Attachment Acts, will, I think, show that their provisions are irreconcilable, except on some such distinction as that here suggested.

Of course, whenever the writ is served on a garnishee *in possession*, it acts in both its capacities; it fixes a lien on the known and visible property of the absent debtor, and acts also as a bill of discovery, by the return, which as will be hereafter shown, the garnishee must make; but in many cases it has the single operation of a bill of discovery.

If there is no one in possession of property, known or supposed to be the property of the absent debtor, the Sheriff shall take the same into his custody, and fix up at the Court House door an account of the effects attached with a notice requiring all persons claiming the same, to appear at the return of the writ, and show cause why the same should not be adjudged to belong to the absent debtor;[b] and if no one appear, or no cause is shown, the same shall be adjudged to be the property of the absent debtor.[c]

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[a] See the case of Parker vs. Parker, 2 Hill Ch., 39. The authority of this case has however been much weakened by the Act of 1844, requiring the payment to the assignees, of all moneys, &c., attached.

[b] Act of 1744, 3 Stat., 618; Act of 1839, 11 Stat., 28.

[c] 3 Stat., 618.

If there is any one in possession, the Sheriff serves him personally with a copy of the writ, and if the garnishee does not on oath claim the property as creditor in possession, he must surrender and deliver it up to the Sheriff, or give bond with surety not to waste or eloign the property, to render a schedule on oath, to make due return to the writ, and to surrender the property attached when thereto required by law.[a]

If the garnishee claim as creditor in possession, he is entitled to retain possession of the property attached, without giving bond;[b] but as this would leave to the garnishee the power of removing the effects attached beyond the State, the second section of the Act of 1844, provides that if the plaintiff or his attorney will make oath that he has just cause to believe that the garnishee is about to move the property beyond the limits of the State, or to waste or destroy the same, the Sheriff may cause such person to enter into bond with security, in double the amount sued for, to make the returns, and surrender the property according to law.[c]

But it may, and often does happen, that the plaintiff is ignorant, whether or no there is any property of the absent debtor in the State, but has reason to suspect from the course of trade, or other circumstances, that a certain person has in his possession or power, effects of the absent debtor, or is indebted to the absent debtor; to enable the plaintiff to ascertain that fact, the law provides him with the writ of attachment, and the party supposed to be in possession of property of the absent debtor, is served with the writ, by which he is compelled to appear at the return of the writ, and discover *on oath* what sum or sums of money, debts, goods, chattels, books of account, &c., he has in his hands, possession or power, to which the absent debtor hath any right claim or property whatsoever." Act of 1744, 3 Stat., 617.

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[a] Act of 1844, 11 Stat., 290.

[b] State vs. Berry, Dudley, 218; Moore & Davis vs. Byne & Hust, 1 Rich., 94.

[c] Act of 1844, 11 Stat., 290; See also Moore & Davis vs. Byne & Hust, 1 Rich., 94, and Byne vs. Byne, Ibid., 441.

It has already been stated, that one of the objects of the second section of the Act of 1844, (11 Stat., 290,) was to provide a security against the eloignment or wasting of the attached goods, while retained by the garnishee as creditor in possession; and such is the construction given to it in Byne vs. Byne, 1 Rich., 441; but the section applies with equal, if not greater propriety to the case, where the plaintiff believing the garnishee to be in possession of property of the absent debtor, seeks protection against the eloignment or wasting of the property during the interval between the service of the writ on the garnishee, and his return to it. There are no means of compelling the garnishee to declare, on service of the writ, whether or no he has in his possession or power, property liable to attachment, (as there is where the *visible property* of the debtor is attached in the hands of the garnishee, and he compelled to surrender, or claim on oath as creditor,) and until the return, the plantiff cannot know whether the garnishee holds any attachable property; or the garnishee may in his return deny that he has any property of the absent debtor, and the plaintiff only discover the fraud after the property has been eloigned, and placed beyond the reach of the process.

Prior to this section of the Act of 1844, the plaintiff was remediless in such case, except against the garnishee personally, which might be equivalent to having no remedy; but by the second section of the Act, the plaintiff is entitled to a bond from the garnishee, by which the property is protected until the return of the garnishee, or while the plaintiff seeks evidence to falsify the return. It is proper to remark, that I have found no case in which the affidavit was made and bond taken at the issuing and service of the writ, but the language of the Act seems too clear to admit of doubt, especially since it prescribes that the affidavit shall be "annexed to the process," and that "the Sheriff on executing the process," shall take the bond, &c., evidently indicating the remedy as moving *pari passu* with the writ, whereas when applied to a garnishee claiming as creditor in possession, it is a subsequent proceeding; since until ser-

vice, the plaintiff can not know whether the garnishee will surrender or will claim as creditor.

In every case where a garnishee is served with a copy of the writ, a return must be made. If a discovery is sought, the return is necessary, so as to inform the Court whether or no the garnishee has in his possession any attachable property, and if any, the nature and value of it. If the garnishee claim as creditor, it is necessary, in order to show the nature and value of the property attached, and the amount of the creditor's claim upon it. If the garnishee does not claim as creditor in possession, but retains the goods attached, he is bound by the condition of his bond to make return; and if he surrender the goods on service of the writ, he is still bound to make return, for *non constat*, that the goods surrendered are *all* the goods or property of the absent debtor in his possession; and the discovery on oath by his return is necessary as *prima facie* evidence of that fact.[a] The return of the garnishee should state not only what goods were in his hands or possession, but also what were in his power,[b] and since the Act of 1844, it should state what were in his "possession, custody, power, or control."[c] It is intimated in Burrell vs. Letson, (1 Strobhart's Reports, page 245,) that the words "hands, power, or possession" are used as of equivalent import, and that the words "power or possession" do not enlarge the meaning of the words "in the hands of;" but this *dictum*, it is respectfully submitted, is erroneous, and the legislative construction given to the word "power" by the Act of 1844, which uses the words "power, custody, or control," seems to have escaped his Honor's attention. The Act of 1844 did not enlarge the powers of Attachment given by the Act of 1744; it rendered nothing attachable which was not before attachable, and the words "custody and control" mentioned in it are only a legislative interpretation of the word "power," indicating that it is not synonymous with, but more comprehensive than, the word possession.

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[a] See Hunter and Brown vs. Andrews, 2 Spear, 73.

[b] Tavel vs. Barre, 2 McC., 201.

[c] See form of Return in Appendix.

If the garnishee claim the goods attached as creditor in possession, he should set forth in his return specifically the effects attached, and also the amount and nature of the indebtedness of the absent debtor to him, and if the effects attached, were obtained *bona fide* and legally by the garnishee, he shall be allowed his debt—he filing his declaration precisely as if he were plaintiff in the attachment.[a] To entitle the garnishee to claim as creditor in-possession, he should have a lien for outstanding liabilities incurred on behalf of the absent debtor,[b] or an actionable demand against the absent debtor at the time of service of the writ. A liability contingent at the time of service of the writ—even though it become fixed and absolute before the return to the writ—does not entitle the garnishee to claim as creditor in possession.[c] The later cases lay down the rule that the garnishee claiming as creditor in possession, stands on the footing of a plaintiff in attachment, who has secured the first lien by the first service of a writ.[d] The distinction between the cases of The Bank vs. Levy, and Young vs. Linton, is that in the former there was by the custom of trade a lien, but none in the latter. As to the possession he should have, the rule is, that wherever the goods are attachable in his hands, possession, power or control, there the garnishee has such possession as entitles him to claim to retain them as creditor in possession. (See Mitchell vs. Byrne, 6 Rich., 182.)

The return must be under oath, except where the garnishee is a corporation, in which case it is sufficient, if under the seal of the corporation.[e] Properly, the return should be made "at the return of the writ, or during the sitting of the Court next after the return of the writ." (3 Stat., 617.) The Court may, however, on good cause

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[a] 3 Stat., 619, § 6.

[b] Bank vs. Levy, 1 McM., 436.

[c] Martin vs. Solomons, 10 Rich., 533.

[d] Walker & Bradford vs. Roberts, 4 Rich., 561; Mitchell vs. Byrne, 6 Rich., 171; Young vs. Linton, Ibid, 278.

[e] Callahan vs. Hallowell, 2 Bay, 10.

shown, permit the return to be made at the second term,[a] or the Court may, in its discretion, even after judgment had against the absent debtor, permit a garnishee to amend his return.[b]

Should the garnishee neglect or refuse to make the return, upon motion made in open Court, after two days' notice thereof served personally upon the garnishee, or in case of garnishee's absence posted on the Court House door, judgment shall be entered up against the garnishee, and execution issued;[c] but judgment must be first had against the absent debtor before any proceedings can be had against the defaulting garnishee.[d] The usual practice is to enter an order that the plaintiff have leave to enter up judgment against the garnishee, and when there are several garnishees, there should be separate judgments entered, and separate executions issued against each. (Pringle vs. Carter, 1 Hill, 53.) This case was prior to the Act of 1844, but that Act, except so far as regards the notice required, does not vary from the Act of 1744.

It is proper, though not usual, for the attorney of the garnishee to move, on the coming in of the return, or during the term, that the garnishee be discharged. The motion is useful as forcing the plaintiff to his election, and informing the garnishee whether or no he will be called on to substantiate his return. (See Martin vs. Parham, 1 Hill, 215.) If plaintiff does not dispute the correctness of the return, the garnishee, on delivering up the property to the assignee appointed by the Court, as will hereafter be shown, is discharged.[e]

If the plaintiff is not satisfied of the correctness of the return, he is entitled to contest it, by filing suggestions, to be tried by a jury, in which he must set forth the particu-

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[a] Creach vs. DeLane, 1 N. & McC., 191; Green vs. McDonnell, 1 Bail., 304; Hunter & Brown vs. Andrews, 2 Spear, 74.

[b] Horsey & Co. vs. Palmer, 9 Rich., 124.

[c] Act of 1844, § 3, 11 Stat., 290.

[d] Act of 1744, 3 Stat., 618; Richardson vs. Whitfield, 1 McC., 403.

[e] Chambers & Sadler vs. McKee, 1 Hill, 229.

lars in which the return is defective or false, and in addition to the allegations that at the time of the service of the writ, the garnishee had in his possession, power or control, certain property not embraced in the return, the suggestions should charge such increase by interest, hire or damages, or other circumstances subsequent to the attachment as may enable the jury to ascertain the value, at the time of the verdict, of the property omitted.[a] If the garnishee, or any third person, claim property in the things attached, the truth is to be ascertained by a feigned issue, in which the garnishee or party claiming is actor.[b]

When the return of the garnishee is so insufficient, vague, or imperfect, that the plaintiff cannot file suggestions contesting it, and a more full and explicit return is required, the practice is for the plaintiff in attachment to file the grounds of his exceptions to the return, and two days' notice being personally served on the garnishee, or, in his absence, posted on the Court House door, to move the Court for an order compelling the garnishee to file a full and complete return on or before a day named in the order, and that in the event of garnishee's default, that the plaintiff have leave to enter up judgment against the garnishee as if no return had been made.[c] When the full return is made in obedience to the order, the plaintiff, if objecting to its corrections, may then file suggestions contesting the return.

The suggestions may be filed, as of course, at any time during the return term of the writ, or the vacation following; if not filed before the second term, it can then only be filed by leave of Court on cause shown. If not filed within a year and a day from the return of the writ, the plaintiff is out of Court, and cannot afterwards obtain leave. If the suggestion is filed during the return term of the writ, the garnishee may be put to plead, and try the same

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[a] Act of 1744, 3 Stat., 618; Gage vs. Wilburn, 2 Brev., 485; Cohen ads. Sherman, 2 Spear, 534.

[b] Goldthwait & Evans vs. Bryant, 1 McM., 452.

[c] See Act of 1844, § 3, 11 Stat., 290.

forthwith, or the Court, in its discretion, may appoint a future term for the trial of the issue.[a] On the trial of the issue, the jury are limited to finding the truth or falsity of the return, upon the allegations contained in the suggestions;[b] and if the jury find specific chattels in the hands of the garnishee to belong to the absent debtor, they should also find the value of them.[c] The finding of the jury in favor of the plaintiff is equivalent to an amendment of the garnishee's return, and no execution issues (except for costs) against the garnishee, but simply an order of Court directing him to deliver up the property—obedience to which is enforced by an attachment for contempt.[d]

What effect the death of the defendant pending the suit has upon the garnishee, is uncertain. If the defendant dies after the expiration of the rule to plead, when, as has been previously shown (*ante*, page 28), judgment by default is entered, it only remains for plaintiff to issue *sci. fa.* to the personal representations to show cause why the damages should not be assessed. The proceedings against the garnishee hold good,[e] but if defendant dies before the expiration of the rule to plead, it is doubtful what effect the death has. In Hitchborn vs. Radcliffe, (3 Brev., 23, S. C.; 1 Treadw., 83,) it was held that the action would abate, but the decision in that case manifestly turned upon the point that the proceeding by attachment was a proceeding in *personam*—a position refuted by all the subsequent cases, (see Fife vs. Clark, 3 McC., 347,) and in The Bank vs. McRae, 2 Spear, 641, the Court, although recognizing the error of Hitchborn and Radcliffe, declined to lay down any rule on the subject.

The death of the garnishee pending the proceedings does not abate the action, but a judgment entered up against the garnishee after his death, is irregular, and may be set aside. (Parker vs. Parker, 2 Hill Ch., 38.)

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[a] Martin vs. Parham, 1 Hill, 213; Burrell vs. Letson, 1 Strob., 244.

[b] Westmoreland vs. Tippens, 1 Bail., 514.

[c] Sherman vs. Barrett, 1 Rich., 457.

[d] Cohen ads. Sherman, 2 Spear, 534; same case, 2 Strob., 556.

[e] Bank vs. McRae, 2 Spear, 641.

Upon the return to the writ, either by the Sheriff or the garnishee, the Court of Common Pleas, or any law Judge at chambers, may appoint one or more assignees, with full power to receive and take from the Sheriff or garnishee all the property attached; to take possession of any land, leasehold estates or chattels real, attached, and to receive the rents of the same; to sue in the name of the absent debtor for all monies due him, and to give receipts therefor; such assignees giving bond for faithful conduct. (Act of 1844, 11 Stat., 291, § 6 and 7.) If there should be any articles, perishable or expensive to keep, among the effects attached, any law Judge, on application made, and proper cause shown, may grant an order for the sale of such property, (Act of 1744, § 7, 3 Stat., 619;) apparently, the application may be made either by plaintiff or assignee. The declaration should be filed within two months after the return of the writ, unless cause shown for further time;[a] but if filed before the expiration of a year and a day from the return of the writ, it will preserve the first attaching creditor's lien, unless a junior attaching creditor shall rule him to declare, and on his default, enter up against him a judgment of *non pros.*[b] At the time of filing the declaration, the plaintiff should make oath of the debt or sum demanded, and that no part of it has been paid, and that he does not in any way stand indebted to the defendant.[c] The affidavit need not, however, be made at the precise time of filing the declaration,[d] nor need it be filed with the declaration or recorded;[e] and if the affidavit is altogether omitted, the objection cannot be taken by the defendant, after pleading to the merits.[f]

On filing the declaration, the plaintiff should serve the wife or attorney of the defendant, if either are known to be

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[a] Act of 1744, § 2, 3 Stat., 618.

[b] Stephen vs. Thayer, 2 Bay, 272; McBride vs. Floyd, 2 Bail., 209.

[c] Act of 1744, § 5, 3 Stat., 619.

[d] Creagh vs. Delane, 1 N. & McC., 189.

[e] Foster vs. Jones, 1 McC., 116.

[f] Stoney vs. McNeill, Harper, 156.

within the State, with a copy of the declaration, with a special order of Court endorsed thereon, ordering when such absent debtor shall plead to the action; and the Court may allow any time for the same, not exceeding a year and a day; and in case the absent debtor has neither wife nor attorney within the State, notice for him to appear and plead shall be published once every three months in the public gazettes, and if the debtor does not "appear and make his defence within a year and a day from filing the declaration, final and absolute judgment shall be forthwith given and awarded for the plaintiff in attachment."[a] Such is the language of the Act, but by the construction given to it in the case of Williams vs. Haseldon, (10 Rich., 56,) the absent debtor may, after the expiration of the year and day, appear and put in special bail, and at the succeeding term set aside the interlocutory judgment, dissolve the attachment and obtain leave to plead to the action.

The wife of the absent debtor cannot appear and plead to the declaration,[b] and formerly the defendant could not appear in person or by attorney, and defend the action, without entering special bail;[c] but by the Act of 1843, (11 Stat., 256,) the defendant may at any time before the expiration of the usual rule to plead, appear by attorney and plead to the declaration, without putting in bail to the action: provided, that a warrant of attorney, duly executed by defendant, shall be first filed in the office of the Clerk issuing the attachment. The Act[d] contains another and most important provision, by which, in a case where the absent debtor appears and defends the action by attorney, authorized by a warrant, not only is the lien of the attachment preserved, but on judgment had against the defendant, execution may be levied on *all* his estate and effects. The same rule obtains if the defendant appear by attorney, and puts in bail to the action; but if defendant fails to appear, the judgment had against him only operates on the property

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[a] Act of 1744, § 2, 3 Stat., 618.
[b] Vann vs. Frederick, 2 Bail., 303.
[c] See Acock vs. Linn, Harper, 368.
[d] Act of 1843, 11 Stat., 257.

attached, which shall, on final judgment had, be delivered to the plaintiff.[a]

The reason for the distinction drawn by the Act between cases where the defendant appears by attorney authorized by warrant, or by bail put in, and where the defendant fails to appear, is manifest; for by his own appearance and defence, or the appearance and defence of one authorized to act for him, the proceeding is no longer *ex parte*, but the case is fairly presented and regularly adjudicated upon, and it is no hardship to the defendant that the remedy of the plaintiff, (by means of his execution,) should be extended to property other than that attached. *It is presumed* that where the defendant appears in person and defends the action, without putting in bail, the same rule would obtain, and the plaintiff not only receive the *fund attached*, but also have execution either of *fi. fa.* or *ca. sa.* against the property or person of the debtor. The Act only provides that no judgment against "an *absent* debtor" shall operate against any other than the property attached. The debtor, by appearing, is no longer absent, and cannot claim a protection from the attachment, which he would not have had without it. The doctrine of the earlier cases, that the process cannot be against the person and the property of the defendant at the same time,[b] has been altered by the Act of 1843, which gives the plaintiff a right to the funds attached, and to execution of *fi. fa.* and *ca sa.* against all the property and the person of the defendant, in cases where he defends the action by attorney; and it is difficult to perceive the reason why a different rule should obtain, when the suit is defended by an attorney authorized by warrant, than obtains where the defendant himself in person defends the suit.

The Courts were formerly forced to declare the attachment dissolved by the appearance of the defendant; but since the decision that the process could not be against

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[a] Act of 1843, 11 Stat., 256, and Act of 1844, § 4, 11 Stat., 291, repealing § 3 of Act of 1744, 3 Stat., 618; Wigfall vs. Byne, 1 Rich., 413; Shooter vs. McDuffie, 5 Rich., 63.

[b] Acock vs. Linn, Harp., 369; Fife & Co. vs. Clark, 3 McC., 347.

the person and the property at the same time have been overruled, what obstacle is there to holding (in cases where the defendant appears in person) that the judgment is good against all the effects of the defendant, and the lien of the attachment undisturbed. It would reconcile the language of the Statute with the reason of the rule laid down by the Court, (in Harper, 369, and 3 McC., 347,) and prevents the anomaly of a defendant's controlling the scope and effect of a judgment by his mode of appearing and defending the action.

When the defendant appears in person, and puts in special bail, the attachment is dissolved. The proceeding hitherto in *rem* becomes, by the putting in of bail, converted into a proceeding in *personam*, and the suit progresses as if the defendant had been originally arrested on a bail writ and given bail.[a]

INSOLVENT DEBTORS AND PRISON BOUNDS ACTS.

We have traced the progress of a suit from the writ to the execution, and ordinarily the suit there ends, but there is an occasional supplemental proceeding. The debtor may pray the benefit of the Insolvent Debtor or Prison Bounds Act, and to omit all notice of the practice under these Acts is to leave the history of a suit unfinished. The difficulty, however, of giving anything like a clear systematized view of these Acts, is so great as almost to deter from the attempt. It is hazarding little to say, that no two Acts of the Legislature have ever given so much embarrassment, or so much perplexed the bench and bar as to their true import and effect. But the very difficulty of the undertaking furnishes

[a] Act of 1744, § 7, 3 Stat., 620; Fife vs. Clarke, 3 McC., 347; Crosbie vs. Reed, 2 McM., 15; Shooter vs. McDuffie, 5 Rich., 63.

the strongest reason why the attempt should be made. To leave the matter untouched because difficult, is to desert the student where assistance is most needed, and although well aware that the following sketch is open to many objections, and is possibly, in many respects deficient, I have nevertheless, concluded (in the absence of any other treatise on the subject) to publish it, with the hope that if it does not furnish all the explanation required, it may yet serve to point the student to the sources whence a better knowledge may be desired, and perhaps stimulate others more competent for the task, to furnish something better worthy of reliance. Stating thus candidly my doubts, I proceed to examine the Acts.

These two Acts cannot be construed so as to form one regular and consistent system.[a] They furnish to persons confined for debt three different modes of relief unlike in substance and differing in effect. The construction is thus rendered doubtful and obscure, and there seems to be not only inconsistencies but actual repugnancies. The only intelligible arrangement, perhaps, will be to classify the various provisions and clauses of the several Acts under three distinct heads.

1. The benefit of the Rules.

2. The benefit of the Insolvent Debtor or Ninety Day Act.

3. The benefit of the Prison Bounds or Ten Day Act.

Prior to the Act of 1788, an applicant for the benefit of the Insolvent Debtor's Act was obliged to go to jail and there remain until the Court decided on the merits of his application;[b] but by the Act of 1788 it was enacted from motives of humanity, that the prisoners confined for debt, whether on mesne or on final process, (see § 1 and 3,) shall be entitled to the prison rules or limits, (which rules were extended three hundred and fifty yards in every direction from the prison walls, and subsequently by the Act of 1841, 11 Stat., 153, so extended as to comprise the judicial

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[a] Brevard's Digest, vol. 2, p. 157. [b] See the Oath, § 1, Act of 1759, 4 Stat., 87.

district,) on condition of giving bond with security to the Sheriff, not to transgress the limits.

If the prisoner is arrested on mesne process the condition of the bond is simply as above stated, viz: Not to go beyond the prison rules. If arrested on *final* process the condition of the bond is not to go beyond the rules, *and*, "*also*, to render within forty days from the date thereof a schedule on oath of his whole estate, or of so much as will pay and satisfy the sum due on the writ of execution, and shall also at the expiration of the notice prescribed under the Insolvent Debtors and Prison Bounds Acts respectively, assign and surrender" the property mentioned in the schedule.[a]

It will thus be seen that it is perfectly immaterial whether the prisoner arrested intends taking the benefit of the Insolvent Debtors or the Prison Bounds Act, the mode of obtaining the rules is the same. The rules are in effect nothing but a release of the prisoner from actual confinement, and do not in any way prejudice his right afterwards to elect which Act he will take the benefit of.

There are, however, some distinctions between the rights of prisoners arrested on mesne process, and prisoners arrested on final process, which it is proper to notice.

1st. A prisoner arrested on mesne process, may *at any time* apply for the rules,[b] whilst a prisoner on final process must apply "within forty days after being taken in execution." (§ 3, 1788.) A prisoner on execution may, however, remain in actual confinement up to the fortieth day and then give bond for the rules, and proceed to take the benefit of the Act, filing his schedule within forty days from the date of his bond.[c]

2d. A prisoner on *mesne* process can file his schedule at any time, whilst a prisoner on *final* process *must* file it within

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[a] See form of bond, Miller's Compilation, 227, 228; Act of 1788, ℣ 2 and 3, 5 Stat., 78: Muldrow vs. Bacot, 2 McM., 363.

[b] Act of 1788, ℣ 2. See Brevard's Digest, vol. 2, p. 148, note.

[c] See ℣ 3 and 6 of Act of 1788, and Walker vs. Briggs, 1 Hill, 121.

forty days from the date of his bond, or be debarred the benefit of the rules and the Insolvent Debtors Act.[a]

The rules being granted, the next question for the prisoner to decide, is for what Act he will apply, the Insolvent Debtors or the Prison Bounds. If his arrest was on final process, then by the terms of his bond he has until the expiration of forty days from the date of his bond in which to decide. If, however, the defendant was arrested on final process and has not taken the benefit of the rules, then he must apply for the benefit of the Insolvent Debtors Act within forty days from his arrest, for if he remains in actual confinement on execution above forty days, he is debarred the benefits of the Act.[b] *

If his arrest was on *mesne* process, he may, I presume, apply at any time for either Act; (see § 4, 1788, and Brevard's Digest, vol. 2, 148, notes,) for I have not been able to find any positive authority on the point.

Having shown the manner of obtaining the rules, we come to the Insolvent Debtors Act, and, 1st. Who are entitled to it.

"Any person," free persons of color included,[c] "sued, impleaded or arrested for any debt, duty, demand, cause, or thing whatsoever," "unless sued, impleaded or arrested for damages recovered in an action for wilful maihem or wilful and malicious trespass, or for damages recovered in any action for voluntary and permissive waste, or for damages done the freehold,"[d] is entitled to the benefit of the Act.

A defendant imprisoned under execution in case of slander,[e] or in an action of assault and battery,[f] or for damages

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[a] Act of 1788, § 7, 5 Stat., 78; and Stover vs. Duren, 2 McCord, 266.

[b] Act of 1788, § 6.

* In the former edition, it was laid down that the defendant being in actual confinement on execution above forty days, deprived him of the benefit of the Act, and that it therefore was necessary to take the rules in order to secure the benefit of the Act. The better construction is the above, which limits the forty days' confinement to that preceding the application for the Act.

[c] Rodgers ads. Norton, Harp., 5; Glenn vs. Lopez, Ibid, 105.

[d] Act of 1759, § 8, and Act of 1788, § 7.

[e] Wallings vs. Jennings, 1 McC., 10.

[f] Bampfield vs. Elland, 2 McC., 182.

recovered in an action for malicious prosecution,[a] or for damages recovered in an action of trespass, *quare clausum fregit* is entitled to the benefit of the Act, the term "damage to the freehold," being restricted to damages in the nature of waste.[b] So, too, under the term "wilful and malicious trespass," are included only such cases as by the Statutes 22 and 23, Charles II, c. 7, fall under the head of malicious mischief.[c]

A debtor is, however, excluded from the benefit of the Act, if he hath given more than one hundred pounds proclamation money to any of his children on their marriage,—unless he show himself clear of debt at the time; or have lost in any one day the sum of £5 proc., or in all, the sum of £20 proc., within the space of twelve months preceding his petition, by gambling, horse racing, or betting;[d] or hath been confined on execution above forty days;[e] or hath rendered in a false schedule of his effects;[f] or hath been seen without the prison rules;[g] or shall have spent more than two shillings and sixpence a day; or who shall have within three months before his confinement, or at any time since, paid or assigned his estate or any part thereof to one creditor in preference to another, or fraudulently sold, conveyed or assigned his estate to defraud his creditors.[h]*

The cases upon the latter clause of fraudulent preference are numerous and conflicting, and it is difficult to deduce from them any general rule. The distinction, however, is clearly drawn between paying a creditor and preferring him to the prejudice of others. The mere fact of paying one

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[a] Walker vs. Briggs, 1 Hill, 130.

[b] Smith & Blair vs. Hogg, 2 Rich., 80.

[c] Braker ads. Knight, 3 McC., 80.

[d] Act of 1759, § 8.

[e] Act of 1788, § 6.

[f] Act of 1788, § 10.

[g] See Glenn vs. Lopez, Harper, 105.

[h] Act of 1788, § 7.—This section, although a part of the Prison Bounds Act, applies equally to cases under the Insolvent Debtors' Act. See Dobson vs. Teasdale. 4 McC., 81, and Glenn vs. Lopez, Harper, 108.

* See, however, *post* page 74.

creditor within three months before the confinement of the debtor, does not of itself exclude the debtor from the benefit of the Act—to do that, the payment must have been made with a view to a *fraudulent preference* of that creditor, or in the terms of the Act, it must have been an "undue preference."[a] The mere intentional preference, even, is not sufficient to constitute a fraud—it must be such an intentional preference as altogether to delay, defeat or hinder another creditor from being paid.[b]

The preference must not only be undue and fraudulent, but it must also have been made by the defendant within three months before his confinement, or since, and by the term confinement is meant not the arrest on *mesne process*, but the confinement from which he petitions to be discharged.[c] This limitation as to time does not, however, extend to cases where the debtor has "fraudulently sold, conveyed or assigned his estate to defraud his creditors"—such conveyance or assignment, whenever made, is inoperative; and even, where from circumstances the conveyance might be good and valid in the hands of the alienee, the fraud deprives the debtor of the benefit of the Act, which provides the means of discharge only for the honest, fair-dealing insolvent.[d]

Although fraud in the assignment or preference by the insolvent will deprive him of the benefit of the Act, a fraud committed in obtaining the goods, for the value of which he was arrested, has not the same effect. It is not a fraudulent purchase of the goods, but a fraudulent assignment of them which excludes from the benefit of the Act;[e] so, too, a mere attempt to defraud, not consummated, is insufficient to deprive the applicant of the benefit of the Act.

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[a] Creytor & Sloan vs. Dickerson, 3 McCord, 438; Stover vs. Duren, 2 McCord, 266; Dobson vs. Teasdale, 4 McCord, 81.

[b] See Walker vs. Briggs, 1 Hill, 126; Smith, Wright & Co. vs. Campbell, Rice, 367; Weed & Fanning vs. Evans, 2 Spear, 237; Crenshaw vs. Wetsel, 2 Hill, 418; McKensie, Cadow & Co. vs. Garrison, 10 Rich., 238.

[c] Bulwinkle vs. Grube, 5 Rich., 293.

[d] See Heming vs. Close, 3 Stat., 365; Wiley, Banks & Co. vs. Lawson, 9 Rich., 155.

[e] Mairs vs. Smith, Harper, 128.

If the plaintiff at whose suit the debtor was arrested, discharge him, he cannot obtain the benefit of the Act, even though he may have applied for the Act, and given the notice required.[a]

A defendant who has been arrested on *mesne process*, and given bail, and then procured his bail to surrender him, may take the benefit of the Act.[b]

Having shown who is entitled to the benefit of the Act, we come to the second branch of the subject—the manner of obtaining it.

The debtor having made his election, to take the benefit of the Insolvent Debtors Act, must file his petition. A petition is only necessary when the Insolvent Debtors Act is applied for,[c] and must be addressed to the Justices of the Court, whence the process issued, a Commissioner of special bail having no jurisdiction under the Insolvent Debtors Act.[d] A form of the petition will be found in the appendix.

The petition is filed with the Clerk, the applicant notifying him of what Act he prays the benefit of, and thereupon the Clerk gives the necessary notice, calling on the creditors to appear at a certain day, and show cause, if any they have, why the insolvent should not be discharged.[e] The application for the benefit of the Act must not of necessity be made at the next term of the Court succeeding the filing of the petition, even though ninety days intervene between the filing of the petition and the sitting of the Court; the petitioner is in time if the notice required by the Act is given to the second term, and the application may then be made.[f] The notice must be published for three months in a gazette, unless a different mode of publication is authorized by a special order of the Court.[g] On filing his petition, the

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[a] Clarke vs. Simpson, 1 McM., 287.

[b] Ex parte, Ridgill, 5 Rich., 427.

[c] Muldrow vs. Bacot, 2 McM., 363.

[d] Act of 1759, § 1; Spears vs. Terry, 1 Treadway, 499.

[e] Muldrow vs. Bacot, 2 McM., 363; Beths vs. Nixon, 1 Strob., 148; ex parte Cantey, 11 Rich., 525.

[f] Ex parte, Cantey, 11 Rich., 520.

[g] Act of 1759, § 1; Mordecai vs. La Rissey, 1 Rich., 192.

applicant must render in *on oath*, a schedule of his *whole* estate.[a] Until sworn to, the plaintiff may treat any schedule filed as mere blank paper;[b] but if the applicant omits to swear to it when filed, he may on good cause shown, be permitted to swear to it *nunc pro tunc*.[c]

When the applicant has been arrested on final process, the schedule must be filed within forty days from the date of his bond, and in computing the time, the day of the date of the bond is excluded.[d] If not filed within that time, the applicant is debarred the benefit of the Act, whether the omission was accidental or fraudulent.[e] If, however, sickness intervene, so as to prevent the applicant himself, or the attorney with whom he has left the schedule, from filing it, such sickness is a sufficient excuse for the neglect.[f]

When the applicant has been arrested on *mesne process*, he may, as has already been stated, file his schedule at any time.[g]

The schedule must contain an account of the real and personal estate of the applicant, with the dates of the securities, wherein any part of it consists, and the deeds, notes or vouchers relating thereto, and the names of the witnesses to the same, as far as his knowledge extends. (1 §, 1759.) A contingent interest, whether by executory devise, or remainder in real or in personal property, is such property as should be included in the schedule.[h] In short, the schedule must contain the whole estate of the insolvent debtor, as it existed at the time of making the schedule—his interests in expectancy as well as his interests in possession being included.

If the applicant has, through inadvertance, ignorance or mistake, omitted to include in his schedule, property in

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[a] § 4, 1788; see oath taken by applicant, § 1, 1759.

[b] Walker vs. Briggs, 1 Hill, 124.

[c] Brevard vs. Wylie, 1 Rich., 41.

[d] McElwee vs. White, 2 Rich., 96.

[e] Storer vs. Duren, 2 McCord, 266.

[f] Crovat vs. Coburn, 3 McCord, 14; Blackwell vs. Wilson, 2 Rich., 323.

[g] See *ante* p. 65.

[h] Clerry vs. Spears, 2 Spear, 687; Hutchinson vs. Love, 1 Spear, 145.

which he has any interest, he may be permitted to amend his schedule, after it is filed;[a] and even after suggestions impeaching the schedule have been filed;[b] the granting of leave to amend the schedule, is within the discretion of the Court, but satisfactory proof should be made by affidavit, that the omission arose from ignorance, inadvertance or mistake. If it arises from fraud,[c] or if the motion is not made until the issue made up to test the validity of the schedule, is about to be tried;[d] or if the motion operates to surprise, or delay the creditors, permission to amend will not be granted. When the amendment of the schedule removes the objection set forth in the suggestions, there is then nothing to go to the jury, and the commissioner may grant an order of discharge.[e]

When the applicant is permitted to amend his schedule, the plaintiff has the same right to examine him, touching the new matter, as he had to examine him on the original schedule, (Hyatt vs. Hill, 2 McM., 56,) and by parity of reasoning the plaintiff has the right to file additional suggestion of fraud, based on the new matter.

The schedule being filed, and the notice published on the day appointed, the applicant and the creditors appear before the Court. If the creditors do not appear, there must be proof made by affidavit, of the due publication of the notice, before the matter can proceed.[f] The creditors appearing, or the publication of the notice being proved, the Court proceeds in a summary way to examine into the matter of the petition, and hear what shall be alleged for or against the discharge of the petitioner,[g] who being sworn to answer truly, may be examined touching the truth of his schedule, and touching the nature and extent of his property, rights and credits, liable to be assigned for the benefit of his credi-

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[a] Bingley vs. Smart, 1 McC., 29; Prescott vs. Hubbell, 2 McC., 64.

[b] Craig vs. Pinson, 2 Spear, 179.

[c] Bingley vs. Smart, 1 McC., 29.

[d] Sherman & DeBruhl vs. Barrett, 1 McM., 150.

[e] Craig vs. Pinson, 2 Spear, 179; Bowen vs. Holleyman, 9 Rich., 66.

[f] Bettis vs. Nixon, 1 Strob., 151.

[g] § 1, Act 1759.

tors; and the refusal of any such applicant to answer fully and directly all or any proper questions put to him in the course of such examination, shall prevent his discharge, if otherwise entitled thereto, until he shall have fully answered the same, (Act of 1836, § 1, 6 Stat., 556,) and if it appear on such examination, that he has kept books in relation to his trade or occupation, he may be compelled to produce them, if in his power to do so, (§ 2, Ibid.) If on such examination, the Judge is satisfied that the applicant has been guilty of fraud, he is bound to refuse the application *ad interim*, and order a suggestion to be filed, and an issue made up, in which the creditor shall be actor, so that the matter may be tried by a jury.[a] This course has been adopted since Zilstra's case, (2 Bay, 147,) from a construction in favor of the liberty of the subject, rather than from any direct legislative enactment. If the Judge is not satisfied of the fraud of the applicant, but the creditor opposes the discharge, either for fraud appearing in the schedule, or for fraud discovered on the examination, or because the applicant has given an undue preference, or made a fraudulent assignment, or gone without the prison rules, the creditor may by leave of the Court, file suggestions of fraud, or the Judge may in his discretion empanel a jury to try the facts alleged.[b] In Zilstra's case, (2 Bay, 149,) it was held that "affidavits ought in all cases to be produced to warrant the Court in sending the case to a jury, on a suggestion of fraud," and the same principle was decided in Baker vs. Bushnell, 1 McM., 67, but in Sherman & De Bruhl vs. Barrett, it was held that "whenever the right of a prisoner to be discharged, is resisted on the ground of fraud, there is nothing which requires that there should be any showing on oath," but that if the result of the allegation would be to "delay the hearing of the debtor's application," then affidavits might, in the exercise of a sound discretion, be required by the Judge.

The applicant, however, after pleading to the sugges-

[a] Roser vs. Moye, 1 Rich., 64.

[b] § 7, Act of 1788; Creyton & Sloan vs Dickerson, 3 McC., 438.

tions, cannot, except to the want of affidavits, the pleading over cures the defect.[a]

Hitherto it has been considered that the suggestions were filed after the examination, but it is allowable for the plaintiff to file suggestions as soon as the schedule is filed, and before any examination had; and sometimes it is expedient to do so, as the issue is thereby made up for the ensuing session of Court, and a term saved.

The suggestions are drawn up in the nature of a declaration, but need not be in accordance with the strict rules of pleading; it is sufficient, if they set out in a plain, intelligible manner, the grounds of the complaint, and defendant is only required to set forth his defense in the same plain, intelligible manner.[b] After the issue is made up between the parties, no new specification can be added, unless as has been above shown, amendments to the schedule are made.[c]

The issue being made up, the cause is to be tried by a jury, at the next ensuing session of Court, or unless objections are interposed, it may be sent to the jury then in attendance on the Court.

In general the debtor should be present at the rendering of the verdict upon his application, and if the plaintiff should then desire to have the body of the debtor recommitted to prison, the Judge may make the order.

If the applicant is convicted of fraud, or is out under bond for the rules, it is proper for the Circuit Judge to hear and determine a motion for his arrest, although such order does not seem to be absolutely necessary. The liability of the sureties on the bond for the rules continues until the defendant is retaken.[d]

If either party is dissatisfied with the finding of the jury empanelled to try the suggestions or with the order of the

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[a] Baker vs. Bushnell, 1 McM., 67, and Ibid, 161.

[b] Blair & Co., vs. Thomas Dudley, 291; Gray vs. Schroder, 2 Strob., 136.

[c] Bentley vs. Page, 2 McM., 53; Morein vs. Solomons, 7 Rich., 105, and see *ante* page 71.

[d] Mack & Smith vs. Garrett, 10 Rich., 79.

Judge, they have a right of appeal. If the creditor appeals, the insolvent has the right to go at large pending the appeal, but as soon as the order of the Circut Court is reversed, he must surrender himself or forfeit his right to a discharge.[a] If the insolvent appeals, he has the right to remain within the prison bounds, pending the appeal.[b] If he abandons his appeal he should surrender himself, or be surrendered by his sureties to the bond for the rules. If this is not done, an order for his re-arrest may be had from the Circuit Judge at the term next succeeding the abandonment of the appeal, reasonable notice of the motion being served upon the insolvent.[c]

If the defendent is found guilty of rendering a false schedule, he is forever deprived of the benefit of the Act, for the relief of insolvent debtors, and also of the Prison Bounds Act, and may be remanded to jail, and is further liable to suffer the penalties of wilful perjury.[d]

If guilty of a fraudulent preference, or of any of the offences specified in the seventh section of the Act of 1788, he shall not be discharged, "without fully satisfying the *action* or execution on which he is confined."

It is a generally received opinion, even among the profession, that a fraudulent preference committed within three months before confinement, deprives the applicant of the benefit of the Insolvent Debtors Act, and the language of the cases seems to confirm that opinion,[e] but the seventh section of the Act only provides that in case of fraudulent preference, the applicant shall not be discharged, "*without fully satisfying the action or execution on which he is confined.*" Suppose the debtor to have been found guilty of an undue preference, but that after the verdict he fully satisfies the action or execution on which he is confined; by the terms of the Act he is entitled to his discharge; but what is the effect

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[a] Baker & Co., vs. Bushnell, 1 McM., 274.

[b] Bulwinkle vs. Grube, 5 Rich., 295; Mack & Smith vs. Garrett, 10 Rich., 82.

[c] Mack & Smith vs. Garrett, 10 Rich., 79.

[d] § 15, Act 1759; § 10, Act 1788; see Bulwinkle vs. Grube, 5 Rich., 295.

[e] See 1 McM., 161, 7 Rich., 472; Harper, 108; 1 Hill, 126; Rice, 367; 2 McC. 266.

of that discharge? Is it to be considered as a discharge under the Act, or merely a discharge at common law, arising from the satisfaction of the claim on which the debtor was arrested? The debtor has taken the rules, filed a schedule, and applied for his discharge under the provisions of the Act—an objection, rendered valid by the Act is made against his discharge—he removes it in the manner specified by the Act, (by satisfaction) the preference is no longer "to the prejudice of the plaintiff," and he is discharged. Since all the proceedings have been under the Act, why should not the discharge which is the result of those proceedings be equally referred to the Act, and the discharge be a release from the claims of all suing creditors and a protection from all other creditors for the space of twelve months. If all the suing creditors had taken bail, nothing would be gained, but if any of them had omitted so to do, their claims would be wholly gone.

But concede that the discharge is merely a discharge at common law. It still operates as a protection to the debtor, for on any subsequent application for the Act, the fraudulent preference of which he was found guilty cannot be complained of; for as the first application necessarily required three months' notice, the preference cannot on the second application, be alleged as committed "within three months before confinement," and by the term confinement is meant "the confinement from which the applicant has petitioned to be discharged. (Bulwinkle vs. Grube, 5 Rich., 293,) and thus, although the insolvent may have been guilty of a fraudulent preference, his creditors cannot avail themselves of it to prevent his discharge.

If the examination before the Judge is satisfactory, or the jury find a verdict of not guilty on the suggestions of fraud, the applicant is permitted to take the oath prescribed, (see § 1, 1759, and Miller's Compilation, p. 172,) which must be done in open Court. Upon the applicant's taking the oath, the Court may deliver up to him so much of his bedding, wearing apparel, tools, &c., as they shall deem suitable, and also, the homestead and fifty acres of land, according to the pro-

visions of the Act of 1851, (12 Stat., 85,) in cases where that Act applies, which order is entered on the minutes of the Court,[a] and "immediately thereupon" the Court shall order the applicant "by a short endorsement on the back of his petition," to assign the effects contained in his schedule to the creditor at whose suit the debtor stands charged, or to *such* other person as the Court may direct.[b] If the debtor refuses for the space of ten days to make the assignment pursuant to the order of the Judge, he forfeits his right to the prison rules and may be recommitted to close confinement, *provided* he was taken "in execution on final process."[c] If the applicant has been arrested on *mesne* process, then, if he refuse to assign and surrender the property mentioned in his schedule, at the expiration of the notice prescribed for the Insolvent Debtors and Prison Bounds Acts respectively, he is in like manner deprived of the benefit of the rules and his bond forfeited.[d]

The applicant must not only make the assignment required, but he must also deliver into the possession of the assignee the effects assigned, and he is not entitled to his discharge until he does.[e] If all the effects mentioned in the schedule are not within his power, so as to be delivered up, he must deliver all that he can and within six months after his discharge, must deliver up all "such as shall be afterwards in his power to deliver," or be remanded to jail.[f]

The property thus assigned and delivered vests in the assignee in trust for such creditors as shall be willing to receive a dividend, and shall present their demands within twelve months after the filing of the petition.[g] The assignee is impowered to sue for and collect all debts due the applicant, and any debts paid to the debtor after his discharge may be recovered from the payer, the debtor's receipt being

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[a] Act of 1759, § 1; and see Miller's Compilation, p. 173. [b] Ibid.

[c] See Act of 1840; 11 Stat., 121.

[d] Act of 1841: 11 Stat., 153.

[e] Act of 1759, § 1; Burns vs. Evans, 3 Hill, 296; Act of 1841, 11 Stat., 153; Walker vs. Riley, 10 Rich., 87.

[f] Ibid. [g] Ibid.

no discharge.[a] The duties devolving on the assignees are set forth in the third section of the Act of 1759. See also Cleverly vs. McCollough, 6 Rich., 519.

The assignees take the property subject to all incumbrances, liens, &c., to which it was subject in the hands of the assignor. (Mairs, *et al.*, vs. Smith, 3 McC., 62; Assignees of Cohen vs. Assignees of Grier, 4 McC., 509.) It is the balance only after payment of incumbrances which is vested in them. (Lowrie's Assignees vs. Williamson, 3 McC., 247). It is necessary, however, for the parties to whom the insolvent has assigned, mortgaged, or conveyed in trust any part of his property, or their authorized agents to appear before the Court at the time appointed by the notice for the hearing of the applicant's petition, and render in on oath a true account of the moneys due on such assignment, mortgage, or conveyance; and if the property appears to be worth more than the debt due upon it, the Court shall order it to be sold by the assignees of the insolvent, and to apply the proceeds first to the discharge of the sums due such assignee, mortgagee, or person to whom the conveyance was made, and to apply the residue in like manner as the rest of the insolvent's estate is to be applied. (§ 4, 1759.) Notwithstanding the mortgage, or other incumbrance, the assignee of the insolvent is entitled to the possession of the property assigned, mortgaged, or conveyed in trust, and if it is withheld by the incumbrancer, trover will lie by the assignee. See McLeish vs. Tylee, 4 Strob.

The fifth and sixth sections of the Act of 1759 simply provide further time for absent or sick assignees, mortgagees, &c., to come in and prove their liens, and the seventh section enacts, that if they do not come in and prove the *bona fide* nature of the debt for which such assignment, mortgage, or conveyance in trust, was made as security, they shall lose their lien, and the mortgage, assignment, or conveyance be deemed fraudulent and void.[b]

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[a] Act of 1759, § 17; Tibbets vs. Weaver, 5 Strob., 144.

[b] Porteous vs. Sullivan, 1 McC., 397.

The effects mentioned in the schedule having been assigned and delivered to the assignee. The applicant is discharged and is entitled to receive his certificate of discharge, (for form of discharge see Miller, page 173.)

The discharge releases the insolvent from all suing creditors, and from such other creditors as shall come in within twelve months and present their claims and accept a dividend of the assigned effects.[a]

As to creditors who do not accept under the assignment, they are restricted from suing on their claims for twelve months after the discharge,[b] but as a protection to such creditors the insolvent can never plead the Statute of Limitation against such claims,[c] and the creditors, in order to prevent loss by the failure of testimony, may prove their debt against the insolvent at the time of the discharge; it is not obligatory on them, however, to do so. (King vs. Westendorff, Dud., 245, and Sinclair vs. Lynah, 1 Spear, 246.)

We now come to the Prison Bounds Act, and as no person is entitled to the benefit of the Prison Bounds Act who is not entitled to the Insolvent Debtors Act, (State vs. Gee, 1 Bay, 163,) a reference to the cases under the latter Act is all that is necessary on this point.

The mode of obtaining the benefit of "the rules" has already been shown, and as to *them* there is no difference whether the prisoner intends taking the benefit of the Insolvent Debtors, or of the Prison Bounds Act, but the same distinction exists as to the *time* within which the defendant must apply for the Prison Bounds Act, when he has been arrested on *mesne*, and when he has been arrested on *final process*, that has already been shown to exist in cases under the Insolvent Debtors Act.

A prisoner confined on *mesne process* may at any time during his confinement render his schedule, whereas if confined on *final process* the terms of his bond compel him

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[a] Act of 1759, § 1; Wall vs. Court of Wardens, 1 Bay, 434; Crane vs. Martin, 4 Rich., 252.

[b] Act of 1759, § 2.

[c] Act of 1759, §10.

to render schedule within forty days from the date of his bond.

The schedule filed need not contain an account of the applicant's entire estate, it need only contain sufficient to satisfy the sum really due on the action on which he may be confined, and whether it is sufficient is a matter in the first instance for the determination of the Judge or Commissioner of special bail, who may in his discretion allow the schedule to be amended.[a]

The property included in the schedule should be visible property, if the prisoner is possessed of any such, if not, then of choses in action.[b]

No petition is necessary under the Prison Bounds Act, but the schedule is filed under oath with the Clerk of the Court, "who within ten days after the receipt thereof"[c] shall give "public notice, that the prisoner will be liberated, and the property assigned, unless satisfactory cause is shown to the contrary," before the Judge or Commissioner of special bail.[d] The notice must also be given for ten days,[e] and is usually by advertisement in some gazette of the vicinity, but where there was a written notice served on the plaintiff, who appeared by his attorney, it was held that the public notice was waived;[f] so too, exceptions filed by the plaintiff to the defendant's schedule constitute a waiver of the want of legal notice.[g]

On the day specified in the notice the plaintiff and the prisoner appear before the Judge or Commissioner of special bail, and if no satisfactory cause is shown against the prisoner's discharge, the Judge or Commissioner shall order an assignment of the effects in the schedule to be made to the plaintiff,[h] and by the Act of 1840, (11 Stat.,

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[a] Parravicene vs. Schwach, Harper, 224; Craig vs. Pinson, 2 Spear, 179.
[b] § 5, Act of 1788.
[c] Muldrow vs. Bacot, 2 McM., 363.
[d] § 4, Act of 1788.
[e] Thornton & Hodges vs. Ferguson, 2 Bail., 198.
[f] Mulligan vs. Prince; Rice Digest.—Insolvent Debtor, No. 42.
[g] Rice vs. Seins, 3 Hill, 5.
[h] § 4, Act of 1788.

121,) if the prisoner has been arrested on final process, and refuses to make an assignment for the space of ten days after the order to that effect, he may be "committed to close confinement" until he does, why the same provision does not extend to prisoner's applying for the act on *mesne process* does not appear. The prisoner, however, is not entitled to his discharge, until the property contained in the schedule is delivered up to the assignee, if it be, or has been in the power of the prisoner to deliver up the same at any time since his arrest.[a]

If the plaintiff shows cause against the prisoner's discharge, or desires further time for information, the Judge or Commissioner of special bail before whom the application is heard, has the power to remand him, and appoint another day for his appearance. If the prisoner is accused by the plaintiff of fraud, or of having given an undue preference to one creditor, to the prejudice of the plaintiff, or of having gone without the prison rules, it shall be lawful for the Judge or Commissioner of special bail to empanel a jury to try the issue.[b] Prior to the Act of 1833, it was considered that there was a distinction as to the power of the Commissioner, on *mesne* and on final process; that in cases arising on the former, he could, under the fourth section of the Act of 1783, himself pass upon the sufficiency and fairness of the schedule, but that in cases on final process he must, under the seventh section of the same Act, empanel a jury to try the issue. (See McClure vs. Vernon, 2 Hill, 433.) This distinction is obviated by the Act of 1833; and now, as soon as the prisoner is *accused* of fraud, it is the imperative duty of the Commissioner to empanel a jury.[c] The seventh section of the Act of 1788 applies equally to the Insolvent Debtors and the Prison Bounds Acts, and as what constitutes a fraudulent preference has already been shown,[d] a reference to those

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[a] § 6, Act of 1833; 6 Stat., 493.

[b] § 7, Act of 1788; § 1, Act of 1833; 6 Stat., 491.

[c] Arrants vs. Dunlap, Cheves., 28, and see Blease vs. Farrow, 9 Rich, 46.

[d] See *ante* page 67.

cases is sufficient. The mode of making up the issue by suggestions, and the rules governing the trial of the issue are also the same.

If there is no cause shown against the prisoner's discharge, or the cause shown is tried and proved insufficient, the Judge or Commissioner grants to the prisoner an order of discharge. The verdict in favor of the prisoner is not *ipso facto* a discharge—the order of the Commissioner or Judge before whom the application is made is necessary to give it effect.[a]

Strictly speaking, there is no appeal from the decision of the Commissioner; if he errs in matters of law, the error is to be corrected by *certiorari*, although the same error committed under like circumstances by a Judge, could be corrected by the simpler process of appeal.[b]

If the Commissioner's order is sought to be corrected by *certiorari*, pending the appeal, the prisoner, if appellant, must remain within the prison bounds;[c] if, however, the order is in his favor, and the creditor appeals, the prisoner is, it seems, entitled to go at large until the order is reversed.[d]

The only right of appeal given is from the verdict of the jury on the issues submitted to them under the Act of 1833. If that is in favor of the prisoner and the creditor appeals, the prisoner is entitled to go at large pending the appeal, on giving bond with sureties to the plaintiff to be forthcoming and to abide by the decision of the Court of Appeals.[e] If the appeal is decided against the debtor, then in order to protect his sureties on the bond, he must, in accordance with the Act, be surrendered or appear before the first day of the Circuit Court next succeeding the determination of the appeal. The surrender is the act of the sureties, and is to the Sheriff; the appearance is the act of the debtor, and

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[a] Harley vs. Neilson, 1 Rich., 483.

[b] Graham vs. Beckner, Rice, 47; Caldwell & Co. vs. Metze, 2 Spear, 95; Martin & Walker vs. Stribling, Ibid, 67.

[c] Hall vs. Taggart, Dudley, 370.

[d] See the case of Bulwinkle vs. Grube, 5 Rich., 295.

[e] Act of 1833, § 4, 6 Stat., 492.

should be made to the tribunal which has cognizance of the case. The sitting of the Circuit Court is regarded as merely fixing the period within which the surrender or appearance must be made.[a]

If the verdict of the jury is against the prisoner and he appeals, he must continue to occupy the position in which he was in at the time of the trial.[b]

The effect of a discharge under the Prison Bounds Act is to release the debtor from confinement. If the property assigned in the schedule is sufficient to satisfy the sum due on the actions on which he is confined, it is of course satisfaction, and the debt destroyed. If, however, it is not sufficient, any property that the prisoner may afterwards acquire is liable to satisfy the demand,[c] but the debtor cannot be again arrested on the same cause of action.[d] The clause of the Act rendering liable, after acquired, property, shows the existence of another distinction between cases arising on *mesne* and cases arising on final process. Where the prisoner has been arrested on final process, there is, of course, a judgment, and after acquired property may be reached either by *fi. fa.* or by *sci. fa.* on the judgment;[e] but where the prisoner has been arrested on *mesne process*, by what means is the after acquired property to be reached, and for what amount is it liable?

This closes our review of the provisions of the two Acts. The leading distinctions between them are—

1st. In the different tribunals before which they are respectively tried. Cases under the Insolvent Debtors Act being cognizable only by a Judge and in open Court, whilst under the Prison Bounds Act, they may be tried by a Judge *or* Commissioner of special bail.

2d. In the summary nature of the proceedings, only ten days' notice being required under the Prison Bounds Act.

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[a] Ibid, State vs. Farrow, 9 Rich., 446.

[b] Hall vs. Taggart, Dudley, 370; State vs. Farrow. 9 Rich.. 446.

[c] § 5. Act of 1788.

[d] Akin vs. Moore, 1 Hill, 435.

[e] Akin vs. Moore, 1 Hill, 435.

3d. In the limited effect of the discharge under the Prison Bounds Act, operating, as it does, simply as a discharge from the suit under which the debt is confined, and without preventing other creditors from immediately arresting the debtor and enforcing their claims.

4th. A petition is necessary under the Insolvent Debtors Act, but not under the Prison Bounds Act.

5th. The schedule must, under the Insolvent Debtors Act, contain *all* the debtor's estate, whilst under the Prison Bounds Act, it need only contain sufficient to satisfy the sum due on the action on which he may be confined.

6th. Under the Insolvent Debtors Act, the assignment is to some creditor, but need not necessarily be to the plaintiff. Under the Prison Bounds Act, the assignment must be to the plaintiff.

7th. A debtor remaining in confinement, "*on execution*," above forty days before making application, is deprived of the benefit of the Insolvent Debtors, but not of the Prison Bounds Act.

This closes our sketch of these Acts. If they are regarded as constituting a system for the relief of the insolvent and the protection of the creditor, they must be considered as eminently defective. The difficulty, complexity and embarrassment which attends the creditor in prosecuting his claims cannot be overrated, and operate to discourage him from the prosecution of his rights, and to embolden the fraudulent, by the hope of escape through the many flaws and intricacies which they present; while, on the other hand, the power of punishment given to the creditor when he has succeeded in convicting the debtor of fraud, is at variance with all pre-conceived ideas of justice.

Crimes against the State have their allotted term of punishment, but the insolvent being convicted of fraud, the creditor becomes his jailor, and may continue him in prison as long as he has the inclination to punish, and the means wherewith to gratify it. The observations of Mr. Burke, upon the punishment of insolvency under the debtor law of England, apply with equal force to our punishment of fraud:

"The next fault is, that the inflicting of that punishment is not on the opinion of an equal and public Judge; but is referred to the arbitrary discretion of a private, nay interested, and irritated, individual. He, who formerly is, and substantially ought to be, the Judge, is in reality no more than ministerial, a mere executive instrument of a private man, who is at once Judge and party. Every idea of judicial order is subverted by this precedure. If the insolvency be no crime, why is it punished with arbitrary imprisonment? If it be crime, why is it delivered into private hands to pardon without discretion, or to punish without mercy and without measure?"

What remedy there should be for a system so complex, so insufficient for the protection either of creditor or debtor, and leading to results so anomalous, it is the province of the Legislature to decide. The subject is of sufficient importance to merit attention, and that it may receive it, must be the wish of all who having examined the present system are aware of its defects.

THE UNITED STATES COURTS.

Before tracing the progress of a suit in the Courts of the United States, the preliminary question occurs: What are the suits which may be prosecuted in the Courts of the United States; for the government of the United States being one of limited powers, the judicial power can exist no farther than is granted by the Constitution.

By the third article of the Constitution, it is provided that "the judicial power shall extend to all cases in law and equity, arising under this Constitution; the laws of the United States and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which

the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, and between a State or the citizens thereof, and foreign States, citizens or subjects."

This section of the Constitution received an elaborate exposition in the celebrated case of Chisolm vs. The State of Georgia,[a] and the Chief Justice of the United States analyzing its provisions, declared that the judicial powers of the United States extended to ten descriptions of cases. 1st. To all cases arising under this Constitution, because the meaning, construction and operation of a compact ought always to be ascertained by all the parties, not by authority derived from only one of them. 2nd. To all cases arising under the law of the *United States*, because, as such laws constitutionally made are obligatory on each State, the measure of obligation and obedience ought not to be decided and fixed by the party from whom they are due, but by a tribunal deriving authority from both the parties. 3rd. To all cases arising under treaties made by their authority, because, as treaties are compacts, made by and obligatory on the whole nation, their operation ought not to be affected or regulated by the local laws or Courts of a part of the nation. 4th. To all cases affecting ambassadors or other public ministers and consuls, because, as these are officers of foreign nations, whom this nation are bound to protect and treat according to the laws of nations, cases affecting them ought only to be cognizable by national authority. 5th. To all cases of admiralty and maritime jurisdiction, because, as the seas are the joint property of nations, whose right and privileges relative thereto are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction. 6th. To controversies to which the United States shall be a party, because, in cases in which the whole people are interested it would not be equal or wise to let any one State decide and measure out the justice due to others. 7th.

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[a] 2 Dallas, 419.

To controversies between two or more States, because, domestic tranquility requires that the contentions of States should be peaceably terminated by a common judiciary, and because in a free country justice ought not to depend on the will of either of the litigants. 8th. To controversies between a State and the citizens of another State, because, in case a State, (that is all the citizens of it,) has demands against some citizens of another State, it is better that they should prosecute their demands in a national Court, than in a Court of the State to which those citizens belong—the danger of irritation and criminations arising from apprehensions and suspicions of partiality being thereby obviated; because, in cases where some citizens of one State have demands against all the citizens of another State, the cause of liberty and the rights of men forbid that the latter should be the sole judges of the justice due to the latter, and true republican government requires that free and equal citizens should have free, fair and equal justice. 9th. To controversies between citizens of the same State, claiming lands under grants of different States, because as the rights of the two States to grant the land are drawn into question, neither of the two States ought to decide the controversy. 10th. To controversies between a State or the citizens thereof, and foreign States, citizens or subjects, because, as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations or people, ought to be ascertained by and depend on national authority.

The clause extending the judicial power of the United States to controversies "between citizens of different States," seems to have escaped the attention of the Chief Justice. Its object, probably, was as stated by Mr. Justice Johnson,[a] to establish "an harmonious distribution of justice throughout the Union, to confine the States in the exercise of their judicial sovereignty to cases between their own citizens: to prevent in fact that very power over the rights of citizens

[a] Ogden vs. Saunders, 11 Wheat., 359.

of other States which the origin of the contract might be supposed to give to each State, and thus to obviate that *conflictus legum*, which, any one who studies the subject will plainly perceive, it is infinitely more easy to prevent than to adjust."

By the eleventh amendment to the constitution, adopted in consequence of the decision in the case of Chisolm vs. the State of Georgia, the judicial power of the United States over controversies "between a State and citizens of another State" was limited, and it was provided that the judicial power should "not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

These constitute the limits of the judicial power granted to the United States, and unless a case can be brought under one or the other of the classes enumerated above, the United States Courts cannot entertain jurisdiction of it.

The exercise of the judicial power of the United States within the limits above prescribed is delegated to three Courts — the Supreme, the Circuit, and the District Courts. The first of these is established by the constitution,[a] while the other two are established by act of Congress, passed in pursuance of the eighth section of article second of the Constitution, empowering Congress "to constitute tribunals inferior to the Supreme Court."

The purpose of this sketch is to trace the progress through the Courts of the United States, of a suit at law between individuals, and I shall, therefore, pass unnoticed, the power of the Supreme Court as a Court of original jurisdiction, the jurisdiction of the District Court, which is principally exercised upon causes of admiralty and maritime nature, and that portion of the jurisdiction of the Circuit Court which is exercised as an appellate Court in admiralty causes, and confine myself to an examination of the jurisdiction of the Circuit Court as a Court of original

[a] Art. 3, § 1.

jurisdiction; as it is in that Court that all controversies between individuals must originate.

Originally, the Circuit Court was composed of two associate Justices of the Supreme Court and the District Judge —and the associate Justices changed their circuits each term, but subsequently by acts of Congress, amending the judicial system, the associate Justices were made stationary, attending always the same circuit, and the Circuit Court was composed of the associate Justice for such circuit and the District Judge—and power was given to the District Judge to hold the Circuit Court in the absence of the associate Justice. Nominally and in theory the Circuit Court is composed of the associate Justice and the District Judge, and all the proceedings are addressed to the Judges of the Circuit Court, but owing to the large number of appeals, and the length of the session of the Supreme Court at Washington, the associate Justices rarely attend these circuits, except for the purpose of hearing appeals from the rulings of the District Judge in admiralty, and in causes in the District Court, and practically, the Circuit Court is held by the District Judge alone.

By the Act of 1789,[a] establishing the Circuit Courts, it was enacted that "the Circuit Courts shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature at common law or in equity, when the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State."

The jurisdiction of the Circuit Court thus depends upon the amount involved, *and* the character of the parties litigant. Both must concur to give the jurisdiction. The matter in dispute must, in the words of the Act, "exceed, exclusive of costs, the sum or value of five hundred dollars." It has been frequently determined that the damages

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[a] § 11, 1 U. S. Stat., 78.

laid in the declaration give the jurisdiction as to the matter in dispute.[a] The defendant may, by pleading in abatement to the jurisdiction, contest the value of the matter in dispute, but until some judicial proceedings have taken place, showing upon the record that the sum demanded in the writ and declaration is not the matter in dispute, that sum will be considered by the Court as the matter in dispute in an action for damages.[b] The fact that the judgment is for less than five hundred dollars does not affect the jurisdiction; it only deprives the plaintiff of costs, or subjects him at the discretion of the Court to the payment of costs.[c]

Where the demand in the declaration is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of the Court is to allow the value to be given in evidence.[d]

The jurisdiction depends not only on the amount in dispute, but also on the character of the parties litigant, and they must be either—

1st. The United States as plaintiffs or petitioners; or,

2nd. An alien as a party; or,

3rd. The parties must be citizens of different States.

So far as regards the United States as plaintiffs or petitioners, the jurisdiction is easily determined.

As to aliens, the Act gives jurisdiction to the Circuit Court where "an alien is a party;" and it has been held that the other party to the suit must be a citizen of the United States. That the Constitution did not give to the Court of the United States jurisdiction over suits between aliens, but only over suits between aliens and citizens.[e]

Alien heirs, though claiming through an ancestor who

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[a] Muns vs. Dupont de Nemours, 2 Wash. C. C., 463; Gordon vs. Longest, 16 Peters, 104; Sherman vs. Clark, 3 McLean, 91.

[b] Kanouse vs. Martin, 15 Howard, 208.

[c] Ibid, 15 How., 208; 16 Peters, 104; Green vs. Liter, 8 Cranch, 242.

[d] Ex parte, Bradstreet, 7 Peters, 647.

[e] Mossman vs. Higginson, 4 Dud., 12; Jackson vs. Twentyman, 2 Pet., 136; Montalet vs. Murray, 4 Cranch, 46.

was a citizen of the same State as the defendant, may sue in the United States Court.[a] So, also, suits may be maintained in the United States Courts between citizens of the same States, if the plaintiffs are only nominal parties, and sue for the use of an alien,[b] for in both these cases the aliens are the real parties in interest; and as was said by the Court in the case of McNutt vs. Bland,[c] the Court looks to things not names, to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them, by virtue of some positive law.

An alien does not it seems lose his right to sue or be sued in the United States Courts, until he has taken the oath of citizenship; his declaration of intention under the naturalization laws does not prevent him from being regarded as the citizen of a foreign State, within the meaning of the clause of the Act of 1789,[d] nor is it material in a suit between an alien and a citizen, that the alien is a resident of the same State with the other parties to the suit.[e]

Jurisdiction dependent upon the character of the parties litigant, arises in the third place where the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

The citizenship intended by the Constitution, and the Acts of Congress in reference to the jurisdiction of the Courts of the United States, is nothing more nor less than residence or domicile in a particular State, the person claiming to be a citizen of such State, being at the same time a citizen of the United States.[f]

Executors and administrators citizens of a State, can sue debtors to the estate residing in the same State in which their testator or intestate formerly lived,[g] for executors and

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[a] Weems vs. George, 13 Howard, 190.

[b] Brown vs. Strode, 5 Cr., 303.

[c] 2 Howard, 14.

[d] Baird vs. Byre, 3 Wallace, Jr.

[e] Breedlove vs. Nicolet, 7 Pet., 428.

[f] Read vs. Bertrand, 4 Wash. C. C., 516; Prentiss vs. Barton, 1 Brock., 389; Shelton vs. Tiffin, 6 Howard, 163.

[g] Clarke vs. Mathewson, 12 Peters, 171; Childress vs. Emory, 8 Wheaton, 668.

administrators are not mere nominal parties in interest, the personal property of the decedent being vested in them; but they cannot sue debtors residing in the same State with themselves, notwithstanding that their testator or intestate was a citizen of another State, for as the executors and administrators are the real parties in interest, the suit would in such case be between citizens of the same State.[a]

Where there are two or more joint plaintiffs, or two or more joint defendants, each of the persons concerned in interest must be competent to sue, or liable to be sued in the Courts of the United States, in order to give jurisdiction;[b] but formal parties or nominal parties united with the real parties in interest, will not oust the United States Courts of jurisdiction if the citizenship or character of the real parties be such as to confer jurisdiction within the 11th section of the Act of 1789. So, too, where the citizenship of the parties gives jurisdiction, and the legal right to sue is in the plaintiff, the Court will not inquire into the residence of those who may have an equitable interest in the claim.[c]

With reference to corporations, the rule originally was that a corporation could not sue or be sued in the Courts of the United States if any of the members of the corporation were citizens of the same State with the adverse parties litigant;[d] but since the decision of the Supreme Court in the case of the Louisville Railroad Company vs. Letson,[e] it has been uniformly held that for all purposes of litigation in the Courts of the United States, a corporation created by a State is to be deemed to all intents and purposes a person and to be regarded as a citizen of that State, as much as a natural person, and therefore all investigation or enquiry into the citizenship of its component parts is immaterial.[f]

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[a] Dodge vs. Perkins, 4 Mason, 436.

[b] Strawbridge vs. Curtis, 3 Cr., 267.

[c] Bonafee vs. Williams, 3 How., 574; Irvine vs. Lowry, 14 Peters, 298.

[d] Bank vs. Willis, 3 Sumner, 472; Wilson vs. City Bank, 3 Sumner, 423; Breithaupt vs. Bank of Georgia, 1 Peters, 238; Devereux vs. Bank of United States, 5 Cranch, 57.

[e] 2 Howard, 497.

[f] Ibid, 2 Howard, 558.

So, too, although the Circuit Courts of the United States cannot entertain jurisdiction of a cause where a State is a party to the record; yet where a State becomes a member of a corporation, the Circuit Courts can entertain jurisdiction of the cause, notwithstanding that the State is a party in interest and affected by the result, for the State in becoming a corporator or a partner in a trading company does not communicate to the corporation or company its sovereign privileges or character, but on the contrary abdicates its sovereignty and becomes *pro hac vice* a private citizen.[a]

Where one of the parties to a suit, *pendente lite* removes to and becomes a citizen of the same State with the other party, the jurisdiction having once attached is not ousted by the removal,[b] but the party is allowed to go on and complete his proceeding. So, too, when from the amount involved and the character of the parties, the jurisdiction has once attached, it cannot be divested by any subsequent events. Thus, where suit was brought by a plaintiff, a citizen of one State, against a citizen of another State, and pending the suit the plaintiff died, his executors, although citizens of the same State with the defendant, were allowed to continue the cause. It was conceded that they could not have instituted the suit, but being instituted they could maintain it.[c]

This was in accordance not only with general principles, but was also by virtue of the 31 § of the Act of 1789, which provides that where, in any suit pending in the Courts of the United States, either of the parties shall die before final judgment, the executor or administrator of such deceased party who was plaintiff, petitioner or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment. The continuance of the cause to the next term is granted to the executors, and other

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[a] Bank of the United States vs. Planters Bank of Georgia, 9 Wheat., 907.

[b] Morgan vs. Morgan, 2 Wheat., 290; Mollan vs. Torrance, 9 Wheat., 537.

[c] Clark vs. Mathewson, 12 Peters, 171.

auxiliary provisions are made by the same section to carry the enactment into effect.

The Judiciary Act above cited, (1789,) not only gives to aliens and the citizens of different States the right to sue and be sued originally in the Courts of the United States, but it provides by the 12th section, that "if a suit be commenced in any State Court against any alien or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the Court, and the defendant shall at the time of entering his appearance in such State Court, file a petition for the removal of the cause for trial into the next Circuit Court to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such Court on the first day of its session, copies of said process against him; and, also, for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the State Court to accept the surety and proceed no further in the cause, and any bail that may have been originally taken shall be discharged, and the said copies being entered as aforesaid in such Court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process. And any attachment of the goods or estate of the defendant by the original process shall hold the goods or estate so attached to answer the final judgment in the same manner as by the laws of such State they would have been holden to answer final judgment, had it been rendered by the Court in which the suit commenced. And if in any action commenced in a State Court, the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear to the satisfaction of the Court, either party before the trial shall state to the Court and make affidavit if they require it, that he claims

and shall rely upon a right or title to the land under a grant from a State other than that in which the suit is pending, and produce the original grant or an exemplification of it, except where the loss of public records shall put it out of his power, and shall move that the adverse party inform the Court whether he claims a right or title to the land under a grant from the State in which the suit is pending; the said adverse (party) shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial, and if he informs that he does claim under such grant, the party claiming under the grant first mentioned, may then, on motion remove the cause for trial to the next Circuit Court to be holden in such district: but, if he is the defendant, shall do it under the same regulations as in the before-mentioned case of the removal of a cause into such Court by an alien, and neither party removing the cause shall be allowed to plead or give evidence of any other title than that by him stated as aforesaid, as the ground of his claim."

This section of the Act, it will be perceived, designates three distinct classes of cases in which the right of removal from a State to an United States Court may be exercised: *provided* the amount in dispute exceeds the sum of five hundred dollars, viz:

1st. Suits by a citizen against an alien.

2nd. Suits by a citizen of the State where the suit is brought against a citizen of another State.

3d. Suits between citizens of the same State, concerning the title of land in which the party petitioning for removal claims under a grant from a State other than that in which the suit is pending.

In the first two classes of cases the right of removal is limited to the defendant. In the third class the right of removal may be exercised by either party.

When the right to remove exists, the application for removal must be made by filing the petition for removal at the time of entering appearance in the State Court, accompanied with an offer of good and sufficient security that

the defendant will, on the first day of the ensuing session of the United States Circuit Court, enter in said Court copies of the process against him, and that he will appear therein, and (if bail had been originally demanded) that he will enter special bail.

The petition must be filed in the State Court, having cognizance of the cause, and must recite the existence of the action, and state the ground upon which the right of removal is claimed, and it must be the petition of all the defendants, otherwise the United States Court will not entertain jurisdiction of the cause.[a]

The petition being filed in the State Court, and the offer of security approved, the order is entered in the State Court that the security be accepted, that the cause be removed to the Circuit Court of the United States in and for the district of ———, and (if bail has been put in) that the bail be discharged. Such order being entered, all further proceedings in the State Court are suspended as *coram non judice*,[b] and at the term of the Circuit Court to which the cause is removed, a certified copy of the order made in the State Court is presented to the Court, and an order taken that the cause be entered therein, and the case then proceeds as if originally commenced in the United States Court.

Having shown the class of cases over which the United States Circuit Courts exercise original jurisdiction, it is proper now to regard the limitations which are placed upon the exercise of the jurisdiction. It is provided by the eleventh section of the Judiciary Act, that no person shall be arrested in one district for trial in another, and that no suit shall be brought "against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of sending the writ." By this clause, it will be perceived that suits in the United States Court must be commenced by service of the writ on the defendant, and

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[a] Smith vs. Rhines, 2 Sum., 339.

[b] Gordon vs. Longest, 16 Pet., 97.

that the defendant cannot be made a party in Court by the process of foreign attachment.[a]

But when the suit has been commenced in the State Court by foreign attachment, and the defendant appears and removes the case into the United States Court, in the manner prescribed by twelfth section of the Judiciary Act, no objection can be taken to the mode of commencing the suit, or to the fact that defendant was not found in the district at the time of serving the writ, for by appearance the defendant waives the objection, and places himself precisely in the position he would have been in had process been served upon him,[b] and by the words of the Act, "Any attachment of the goods or estate of the defendant by the original process, shall hold the goods or estate so attached to answer the final judgment, had it been rendered by the Court in which the suit was commenced."[c]

The eleventh section of the Judiciary Act contains, also, another limitation upon the jurisdiction of the Court, in the provision that, "no District or Circuit Court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless, a suit might have been prosecuted in such Court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

The statute, it will be perceived, refers to the assignee, and it has, in the construction given to it by the Courts, been limited to an assignee in the strict technical sense of the word; therefore, when the note is payable to "bearer," the transfer is by delivery, not by assignment, and the bearer is not in the sense of the Act an assignee, and may maintain suit upon it in the Circuit Courts.[d]

The object of the statute seems to be to deny to the

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[a] Toland vs. Sprague, 12 Pet., 327; Picquet vs. Swan, 5 Mason, 35; Hollingsworth vs. Adams, 2 Dall., 396.

[b] Pollard vs. Dwight, 4 Cr., 421.

[c] 12 Sec., 1789; 1 U. S. Stat., 78.

[d] Bell vs. Bullard, 1 Mason, 251; Bonnafee vs. Williams, 3 How., 574.

assignee any greater right by virtue of the assignment than his assignor had.

Thus, where the payee and maker of a promissory note are citizens of the same State, the payee cannot sue the maker in the United States Courts, and as the payee cannot, no subsequent endorsee or assignee can. So, too, an endorsee cannot sue the first or other remote endorser in the United States Courts, unless the intermediate endorsers, through whom he deduces his title, could sue in the United States Courts;[a] but where the citizenship and the amount warrant it, the assignee or endorsee can sue his immediate assignor or endorser in the United States Court, irrespective of the citizenship of the other parties to the paper, for as between them it is a new contract, the parties to which are citizens of different States.[b]

The rule then is, that to entitle an assignee to bring an action in the United States Court on a promissory note or chose in action, he must not only be entitled to sue by virtue of the citizenship of himself and the defendant, but he must also show that those through whom he claims were entitled to sue by virtue of their citizenship. It is immaterial that the parties through whom he claims could not have originally sued in the United States Court. It is sufficient if at the time of assignment they possessed the right to sue upon the paper in the United States Courts; thus when the payee and maker were citizens of the same State, and subsequently the payee removed to another State and then endorsed the paper over, the endorsee was held to be entitled to sue the maker in the United States Courts.[c]

Having shown the jurisdiction of the Circuit Court, it is proper to add a few words as to the proper mode of stating the jurisdiction.

The Circuit Courts, as has been already stated, were created by Congress under that clause of the Constitution empowering them to constitute tribunals inferior to the

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[a] Mollan vs. Torrence, 9 Wheat., 537. [b] Young vs. Bryan, 6 Wheat., 146.
[c] Kirkman vs. Hamilton, 6 Pet., 22.

Supreme Court; but though the Circuit Court is an inferior Court, in the language of the Constitution, it is not so in the language of the common law; nor are its proceedings subject to the scrutiny of those narrow rules which the caution or jealousy of the Courts at Westminster long applied to Courts of that denomination, but are entitled to as liberal intendments or presumptions in favor of their regularity, as those of any Supreme Court. A Circuit Court although not an inferior Court, is, however of *limited* jurisdiction, and has cognizance not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace. And the fair presumption is, (not as with regard to a Court of general jurisdiction, that a cause is within its jurisdiction, unless the contrary appears, but rather,) that a cause is without its jurisdiction till the contrary appears. This renders it necessary, inasmuch as the proceedings of no Court can be deemed valid further than its jurisdiction appears, or can be presumed, to set forth upon the record of a Circuit Court the facts or circumstances which give jurisdiction either expressly or in such manner as to render them certain by legal intendment. Among those circumstances it is necessary where the defendant appears to be a citizen of one State, to show that the plaintiff is a citizen of some other State, or an alien; or if the suit be upon a promissory note, by an assignee, to show that the original promisee is so, for by a special provision of the statute, it is his description as well as that of the assignee, which effectuates jurisdiction.[a]

It must therefore appear upon the record that the amount involved and the character of the parties litigant, support the jurisdiction.[b] If citizens, it must be stated on the record that they are citizens, and of what States they are citizens, and it is not sufficient to style them inhabitants or residents.[c]

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[a] Turner vs. Bank of North America, 4 Dall., 10.

[b] Montalet vs. Murray, 4 Cr., 46.

[c] Bingham vs. Cabot, 3 Dallas, 382; Abercrombie vs. Dressius, 1 Cr., 343; Brown vs. Keene, 8 Peters, 112.

If aliens, not only must the fact of alienage be averred upon the record, but it must also be stated of what foreign State the alien is a subject.[a] If the suit is by or against a corporation, it must be averred on the record that the party is a corporation, and was created a corporation by the law of some State.[b]

It is not, however, necessary in any case to state on the record, in addition to the fact of citizenship or alienage, that the defendant is an inhabitant of the district, or that he was found therein at the time of serving the process.[c] The objection, if it exists, may be taken advantage of by notice to set aside the process, or by plea in abatement.

But even where the pleadings fail to show the jurisdiction of the Court, the judgment rendered in the cause is not a nullity. It is of course erroneous, and may be reversed by writ of error or on appeal, but until reversed, it is binding on all the world,[d] and even where the record clearly fails to show jurisdiction, the defendant may by his *laches* lose the right to except to it, and to reverse the judgment. In the case of Skillern's Executors vs. May's Executors,[e] the case had been carried to the Supreme Court by writ of error, and remanded back to the Circuit Court; and upon again coming before the Circuit Court, it was discovered that the pleadings failed to show jurisdiction. The Supreme Court, however, ruled that it was then too late to except to the jurisdiction.

It has already been seen that when the jurisdiction depends on the citizenship of the parties, that citizenship must be averred, and originally it was held that the averment must be proved on the general issue, and as a consequence of this view, if at any stage of a cause it appeared that the plaintiff's averment of citizenship was not true, he

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[a] Wilson vs. The City Bank, 3 Sumner, 422.

[b] Marshall vs. Baltimore & Ohio R. R. Co., 16 How., 314; Philadelphia & Baltimore R. R. Co. vs. Quigley, 21 How., 207.

[c] Gracie vs. Palmer, 8 Wheat., 699.

[d] Ex parte, Watkins, 3 Pet., 207; McCormick vs. Sullivant, 10 Wheat., 199.

[e] 6 Cranch, 267.

failed in his suit, but it is now held and has been held for many years, that if the defendant disputes the allegations of citizenship, he must plead the fact in abatement and plead in the order of the common law;[a] and, indeed, all matters which go to defeat the jurisdiction of the Court over the particular cause must be pleaded in abatement, otherwise the plea of the general issue will operate as a waiver of the plea to the jurisdiction.[b] This must be understood, however, as applying only to cases where the record shows jurisdiction, for it is evident that on the question of jurisdiction two classes of cases may arise.

1st. Where the record fails to show jurisdiction, there being no averment or an insufficient averment.

2d. Where the record shows jurisdiction but the facts of the case do not sustain the averment.

In the first class of cases the objection to the jurisdiction may be taken at any stage of the cause prior to a decision on the case in the Supreme Court, and it may be taken without any formal plea, for if the attention of the Court is directed to the record and the record fails to show jurisdiction of the cause in the Court, the proceedings are *coram non judice* and the case must be dismissed.

In the second class of cases the record shows jurisdiction, but the objection is to the truth of the averment and must therefore be taken by plea, and the plea must show that the objection or defect of jurisdiction existed at the time the action was brought and not merely at the time of plea pleaded, for as has been already seen, if the jurisdiction existed at the time of action brought it is not divested by subsequent occurrences.[c]

Having shown the class of cases over which the Circuit Courts of the United States exercise jurisdiction, it is proper now to advert to the law by which the judgment of the Court is regulated in deciding the cases submitted to it.

The 34th section of the Act of 1789, provides that the

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[a] Jones vs. League, 18 How., 81. [b] Ibid; Gracie vs. Palmer, 8 Wheat., 699.
[c] Mollaw vs. Torrance, 9 Wheat., 537.

laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply.

This section of the Judiciary contemplates the administration of the local laws of the State, through the instrumentality of the United States Courts, and the parties litigant in submitting a cause to the decision of the United States Court, change the tribunal, but not the law by which the cause is to be decided.

It is a generally recognized principle that the Judicial department of every government is the appropriate organ for construing the legislative Acts of that government, and on this principle the construction given by the United States Court to the Constitution and laws of the United States, is received by all as the true construction, and the construction given by the Courts of the several States to the legislative Acts of those States, is received as true, unless they come in conflict with the Constitution, laws or treaties of the United States,[a] but this principle is limited in its application to State laws strictly local, that is to say to the positive statutes of the State, and the construction given to those Statutes, by the State tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estates and other matters immovable. and intra territorial in their nature and character.[b]

Not only do the United States Courts conform themselves to State decisions on the construction of statutes, holding that the fixed construction of the statute, makes in fact a part of the statute law of the State,[c] but they also conform themselves to the State decisions on the common law when they are fixed rules of property.[d]

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[a] See Ellmen lorf vs. Taylor, 10 Wheat., 160.

[b] Swift vs. Tyson, 16 Pet., 18.

[c] Shelly vs. Guy, 11 Wheat., 367; McKeen vs. DeLancy, 5 Cranch., 22; Polk's Lessee vs. Wendal, 9 Cranch., 98.

[d] Jackson vs. Chew, 12 Wheat., 167.

The close adherence of the Courts of the United States to this principle of adopting the local laws of the State when they are rules of property, and the importance which they attach to it, are strikingly manifested in the case of Green vs. Lessee of Neal.[a] The United States Courts, it is well known, adopt the Acts of limitations of the several States, and give to them the same effect as is given in the State Courts.[b] A case involving the construction of the statute of limitations of the State of Tennessee was before the Supreme Court of the United States, and was decided in conformity to the decision of the State. Some years after the decision of the Supreme Court, the State Court of Tennessee in an elaborate opinion reviewed and reversed their prior decisions, and settled a different construction of the Act of limitations. In this position of the law the case of Green vs. Lessee of Neal came up to the Supreme Court of the United States, and the question was whether the Supreme Court should adhere to its own decision or yield to that of the judicial tribunals of Tennessee. The question was novel and of grave importance and after a review of the cases, and a careful consideration of the principle which had governed the action of the Court, it reversed its own decision and adopted that of the State Court. "A refusal to do, says the Court, would in effect establish two rules of property in the State."

This principle applies, not only to the rules of property, but to the rules of evidence; and the statutes, and decisions of the State on the admission or rejection of evidence furnish the rule of decision for the United States Courts in civil cases.[c]

But the thirty-fourth section of the Judiciary Act, adopting the laws of the several States as rules of decision for the Courts of the United States in those States, does not apply to questions of a more general nature not dependent upon local statutes or local usages of a fixed and permanent

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[a] 6 Pet., 298.

[b] McLuny vs. Silliman, 3 Pet., 277.

[c] McNeill vs. Holbrook. 12 Pet., 89.

operation, as for example, the construction of ordinary contracts or other written instruments, and, especially, to questions of general commercial law, the true interpretation and effect of which are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.[a]

It has been seen that the Courts of the United States, to a great extent, administer the law according to the statutes and decisions of the respective States within which they exercise jurisdiction. The code of practice in the Courts of the United States is in like manner closely assimilated to the practice of the State Courts. This was accomplished at the institution of the United States Courts by the adoption of the State practice as a rule of proceeding.

It is evident, however, that State laws cannot *proprio vigore* control the exercise of the powers of the national government, or in any manner limit or affect the operation of the process or proceedings in the national Courts.[b] They can be obligatory only so far as they have been directly or indirectly adopted by Congress, and Congress, mindful of the changes that might occur in the practice of the State Courts, has carefully provided the means of enabling the Courts of the United States to conform to any change in the State Courts, and thus preserve the uniformity of practice in the respective Courts.[c]

The fourteenth section of the Judiciary Act of 1789[d] empowers the Circuit Court to issue writs of *scire facias*, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages of law.

The Process Act of 1789[e]* expressly adopted the forms

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[a] Swift vs. Tyson, 16 Pet., 18; Watson vs. Tarpley, 18 How., 520.

[b] See opinion of Johnson, J., in Ogden vs. Saunders, 12 Wheat., 213; Wayman vs. Southard, 10 Wheat., 1; Bank vs. Halstead, 10 Wheat., 51.

[c] Beers vs. Houghton, 9 Peters, 359. [d] 1 U. S. Stat., 81. [e] 1 U. S. Stat., 92.

* It enacted, "That the forms of writs and executions, except their style and modes of process in the Circuit Courts in suits at common law, shall be the same in each State respectively as are now used or allowed in the Supreme Courts of the same."

of writs and modes of process of the State Courts in suits at common law. This Act was by its terms to continue in force only until the end of the next session of Congress.

The Process Act of 1792[a] prescribed, section first, that all writs and processes issuing from a Circuit Court should bear test of the Chief Justice of the Supreme Court, or (if that office shall be vacant) of the associate Justice next in precedence.

The second section of the Act permanently continued the "forms of writs, executions, and other processes, and the forms and modes of proceeding" then in use by virtue of the Process Act of 1789, but, with this important difference, that they were "subject to such alterations and additions as the said Courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper from time to time by rule, to prescribe to any Circuit Court concerning the same."

The Judiciary Act of 1793, section seven[b] empowers the Circuit Courts to make rules and orders "directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering and making up judgments by default, and other matters in the vacation and otherwise, in a manner not repugnant to the laws of the United States, to regulate the practice of the said Courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings."

There was thus the direct adoption by Congress of the forms of writs and modes of proceeding of force in the respective States in 1789, and at the same time a vesting in the Circuit Court a power to alter and mould the process of the Courts for the future. The explanation of this legislation is to be found in the difficulties which were inherent in the subject itself, and the wisdom of the legislation has been vindicated by Chief Justice Marshall in the case of

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[a] 1 U. S. Stat., 275.

[b] 1 U. S. Stat., 335.

Wayman vs. Southard, 10 Wheat., 47, "a judicial system," says the Chief Justice, "was to be prepared, not for a consolidated people, but for distinct societies, already possessing distinct systems, and accustomed to laws, which, though originating in the same great principles had been variously modified. The perplexity arising from this state of things was much augmented by the circumstance that, in many of the States, the pressure of the moment had produced deviations from that course of administering justice between debtor and creditor, which consisted, not only with the spirit of the constitution, and consequently with the views of the government, but also, with what might safely be considered as the permanent policy, as well as interest, of the States themselves. The new government could neither entirely disregard these circumstances, nor consider them as permanent. In adopting the temporary mode of proceeding with executions then prevailing in the several States, it was proper to provide for that return to ancient usage, and just, as well as wise principles, which might be expected from those who had yielded to a supposed necessity in departing from them. Congress probably conceived that this object would be best effected by placing in the Courts of the Union the power of altering the "modes of proceeding in suits at common law," which includes the modes of proceeding in the execution of their judgments, in the confidence that in the exercise of this power the ancient, permanent and approved system would be adopted by the Courts, at least, as soon as it should be restored in the several States, by their respective Legislatures. Congress could not have intended to give permanence to temporary laws, of which it disapproved, and, therefore, provided for their change in the very Act which adopted them."

By the Act of 1828[a] (1 Sec.), the provisions of the Process Act of 1789 and 1792 were extended to those States admitted into the Union since the twenty-ninth day of September, 1789, and the third section of the Act (of 1828), applying

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[a] 4 U. S. Stat., 278.

equally to the original thirteen States, and to those subsequently admitted into the Union, provided, that "writs of execution and other final process issued on judgment and decrees rendered in any of the Courts of the United States, and the proceedings thereupon shall be the same, except their style, in each State respectively, as are *now* used in the Courts of each State; *provided, however*, that it shall be in the power of the Courts, if they see fit in their discretion, by rules of Court, so far to alter final process in said Courts, as to conform the same to any change which may be adopted by the Legislatures of the respective States for the State Courts.

And by the Act of 1842, the provision of the Act of 1828 were made applicable to such States as have been admitted into the Union since the nineteenth of May, 1828. These several sections embrace all that has been enacted by Congress relative to the issuing executions and mode of proceeding upon process, mesne and final.

In order, therefore, to determine a question of practice, we are to ascertain: 1st, Whether Congress or the Supreme Court of the United States has prescribed any rule upon the subject. 2d, If not, whether the United States Court, in which the question arises, has laid down a rule upon it. If not, then, 3d, We are to inquire into the practice of the Supreme Court of the State in which the Circuit Court sits. And, lastly, If none of the above sources of information furnish the rule, resort must be had to the practice of the Courts at Westminster.

In applying the third test, however, it is not the practice of the State Courts at the time the question arises which furnishes the rule; but the practice which existed in the State Courts at certain periods fixed by statutes of the United States. Thus, if the question arises on *mesne process*, or the forms and modes of proceedings, and it is in one of the original thirteen States, the practice in force in the State Courts in 1789, furnishes the rule of decision.

If it is in a State admitted into the Union prior to 1828, the practice of the State on the nineteenth day of May, 1828, furnishes the rule. If in a State admitted after 1828,

and prior to 1842, the practice of the State on the first day of August, 1842, furnishes the rule.

If the question arises on *final process* or the proceedings thereon, and in one of the original thirteen States or in a State admitted into the Union prior to 1828, the practice of the State Court on the 19th day of May, 1828, furnishes the rule.

If it arises in a State admitted since 1828, the practice of the State on the 1st day of August, 1842, furnishes the rule.

The constitutional validity and extent of the power thus given to the Courts of the United States, to alter the process of the Court and modes of proceedings has been frequently considered and has been uniformly sustained by the Supreme Court of the United States. It has been further held[a] that the power to alter and add to the process and modes of proceeding in a suit embraced the whole progress of such a suit, and every transaction in it, from its commencement to its termination, and until the judgment should be satisfied, and that it authorized the Courts to prescribe and regulate the conduct of the officer in the execution of final process in giving effect to its judgment; and it was emphatically laid down that "a general superintendance over this subject seems to be properly within the judicial province, and has always been so considered; and that "this provision enables the Courts of the Union to make such improvements in its forms and modes of proceeding as experience may suggest, and especially to adopt such State laws on this subject as might vary to advantage the forms and modes of proceeding which prevailed in September, 1789."[b] The result of this doctrine as practically expounded and applied in the case of the Bank of the United States vs. Halstead,[c] is that the Courts "may, by their rules, not only alter the forms, but the effect and operation of the process, whether *mesne* or final, and the modes of proceeding under it, so that it may reach property not liable in 1789 by the State laws to be taken in execution, or may

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[a] Beers vs. Haughton, 9 Pet., 360. [b] Wayman vs. Southard, 10 Wheat., 42.
[c] 10 Wheat., 51.

exempt property which was not then exempted, but has been exempted by subsequent State laws."[a] These decisions of the Supreme Court in the cases of Wayman vs. Southard, and Bank vs. Halstead, were in 1825, and in 1828 the Act was passed by Congress conforming executions and other final process, and the proceedings thereupon in the Courts of the United States, to the practice in the State Courts, but the principle of these cases remains of force. The only effect of the Act of 1828, so far as regards executions and the proceedings thereupon, has been to change the point of departure and to make the State law of force in 1828 the rule in the place of that which was in force in 1789.

Exercising the power thus given, rules were, at an early period, prescribed by the Circuit Court for this District. These rules are contained in Miller's Compilation. They modify the practice of our State Courts in but few particulars, and are so clear and precise, that little or no difficulty can be experienced in construing or applying them, and I shall therefore only notice such of them as concern the ordinary institution and progress of a suit.

Rules are held in the Clerk's office on the first Monday in every month. The writ (a form of which is found in the Appendix,) is tested in the name of the Chief Justice of the United States, and of some day in the preceding term of the Circuit Court. In this respect it differs from the writ in the State Court, which is tested in the name of the Clerk and of the day it issues.

The writ may be made returnable to the next term of the Court, or to the rules, on the first Monday of the month next ensuing its lodgment with the Marshal; the latter is the course generally adopted, as the plaintiff can thereby ordinarily have the pleadings made up and the case ready for trial at the next term.

If the Marshal is unable to serve the writ, and return it to the Clerk's office at the rules next ensuing its lodgment with him, he returns it to the next succeeding rule day, and to accomplish this no order of Court or alteration in the writ is necessary.

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[a] Beers vs. Haughton, 9 Pet., 360.

As soon as the writ is returned executed, the declaration may be immediately filed. The practice is to have the declaration prepared, and to file it with the Clerk on the rule day to which the writ is returnable, provided the writ has been duly returned executed. Where the declaration is filed on a rule day, no rule to plead is necessary, but it sometimes occurs that to postpone the filing of the declaration to the rule day, would prevent the case being ready for hearing at the next term, in such cases it is proper not to wait until the rule day, but as soon as the writ is returned to file the declaration, and serve the rule to plead on the defendant or his attorney. The form of the rule is the same as in the State Courts.

There is in the United States Court for this District no imparlance term. The time within which a defendant must plead to the declaration is prescribed by the 6th Rule of Court.[a] If defendant fails to plead within the time allowed by the rule, the plaintiff may enter up at the rules before the Clerk an order for judgment by default; but the judgment thus obtained may be set aside at the next rules on motion before the Clerk.[b] If not then set aside, the case is docketed on the enquiry docket; but it is still competent for the defendant within the first two days of the next term on special cause shown, to move to set aside the judgment by default and for leave to plead.[c]

Where the action is on a bill of exchange or promissory note and the plea is *non est factum* or *non assumpsit*, the defendant should file with his plea an affidavit of the truth of it, otherwise the execution of the note or bill is admitted, and plaintiff need not prove it.[d] The 55th, 56th, 57th, 58th and 60th Rules also contain important regulations relative to pleas, but as these rules are to be found in Miller's Compilation, they need not be repeated here.

The pleadings being made up and the cause docketed, the next matter that requires attention is the production of the evidence. The witnesses may be summoned to attend by subpœna, issuing in like manner as from the State Courts,

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[a] Miller, 69. [b] Rule 7. [c] Rule 7. [d] Rule 59.

and the subpœna runs throughout the district and into other districts, but in civil causes, witnesses ~~whether in or~~ out of the district in which the Court is holden who live at a greater distance than one hundred miles from the place of holding the Court,[a] cannot be compelled to attend in obedience to the subpœna.

When the attendance of a witness cannot be obtained by a subpœna, his testimony may be taken by deposition *de bene esse* or by a *dedimus potestatem* or commission, the power to issue which is given to the Courts by the 30th section of the Act of 1789,[b] which provides that "when the testimony of any person shall be necessary in any civil cause depending in any district in any Court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid before the time of trial, or is ancient or very infirm, the deposition of every such person may be taken *de bene esse* before any Justice or Judge of any of the Courts of the United States, or before any Chancellor, Justice or Judge of Supreme or Superior Court, Mayor or Chief Magistrate of a city, or Judge of any County Court or Court of Common Pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause, provided that a notification
* from the Magistrate before whom the deposition is to be taken to the adverse party to be present at the taking of the same, and to put interrogatories, if he thinks fit, be first made out and served on the adverse party or his attorney, as either may be nearest, if either is within one hundred miles of the place of caption, allowing time for their attendance after notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles' travel. And every person deposing as aforesaid, shall be carefully examined and cautioned, and sworn or affirmed to testify *the whole*

[a] Act of 1793, 6 ℥, 1 Stat., 335. [b] 1 Stat., 88.

* amended so as to require the party proposing to examine the witness to give a written notice of time, place & name of witness to the adverse party Revised Stat U.S. p. 162 Sec 863.

truth, and shall subscribe the testimony by him or her given after the same shall be reduced to writing, which shall be done only by the Magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such Magistrate until he deliver the same with his own hand into the Court for which they are taken, or shall together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any given to the adverse party, be by him, the said Magistrate, sealed up and directed to such Court, and remain under his seal until opened in Court. And any person may be compelled to appear and depose as aforesaid, in the same manner as if to appear and testify in Court." It is also by this section further provided that evidence thus taken may be used on the trial of any cause, if "it shall appear to the satisfaction of the Court that the witnesses are then dead, or gone out of the United States, or to a greater distance than as aforesaid, from the place where the Court is sitting, or that by reason of age, sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at Court, but not otherwise."

This mode of taking the testimony of a witness being *ex parte*, and in derogation of the rules of the common law, has been condemned by the Supreme Court, as liable to great abuse, "except in cases of mere formal proof (such as the signature or execution of an instrument of writing), or of some isolated fact (such as demand of a bill or notice to an endorser), and is now but rarely used, a *dedimus potestatem*, or commission, being the mode usually adopted.[a]

The practice in issuing commissions from the Circuit Court of the United States is regulated by the fifty-fourth Rule of Court.[b] Care should be taken in framing the commission, for it is a special authority delegated by the Court to the Commissioners, and must be strictly pursued.[c]

Ordinarily, a summons from the commissioners is suffi-

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[a] Walsh vs. Rogers, 13 How., 287. [b] Miller's Compilation.

[c] Armstrong vs. Brown, 1 Wash. C. C., 43.

cient to secure the attendance of the witness, but should the witness prove refractory, the means of compelling his attendance before the commissioners are given in the first section of the Act of 1827,[a] which provides that, "whenever a commission shall be issued by any Court of the United States for taking the testimony of a witness or witnesses at any place within the United States, or the territories thereof, it shall be lawful for the Clerk of any Court of the United States, for the district or territory within which such place may be, and he is hereby enjoined and required, upon the application of either of the parties in the suit, cause, action or proceeding, in which such commission shall have been issued, his, her, or their agent or agents, to issue a subpœna or subpœnas, for such witness or witnesses, residing or being within the said district or territory, as shall be named in the said commission, commanding such witness or witnesses to appear and testify before the commissioner or commissioners in such commission named, at a time and place in the subpœna to be stated, and if any witness, after being duly served with such subpœna, shall refuse or neglect to appear, or, after appearing, shall refuse to testify, (not being privileged from giving testimony), such refusal or neglect being proved to the satisfaction of any Judge of the Court, whose Clerk shall have issued such subpœna or subpœnas, he may thereupon proceed to enforce obedience to the process, or to punish the disobedience in like manner as any Court of the United States may do in case of disobedience to process of *subpœna ad testificandum* issued by such Court, and the witness, or witnesses, in such case shall be allowed the same compensation as is allowed to witnesses attending the Courts of the United States; *Provided*, That no witness shall be required to attend at any place out of the county in which he may reside, nor more than forty miles from his place of residence, to give his deposition under this law."

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[a] 4 Stat., 197.

When it is desirable that the witness should produce books or papers before the commissioners, the means of compelling the attendance of the witness and the production of the books and papers are given by the second section of the Act of 1827, which provides, that, "when ever either of the parties in such suit, cause, action, or proceeding, shall apply to any Judge of a Court of the United States, in the district or territory of the United States, in which the place for taking such testimony may be for a *subpœna duces tecum*, commanding the witness therein to be named, to appear and testify before the said commissioner or commissioners, at the time and place in the said subpœna to be stated, and also to bring and carry with him or her, and produce to such commissioner or commissioners, any paper, writing, or written instrument, or book, or other document, supposed to be in the possession or power of such witness, such Judge being satisfied by the affidavit of the person applying or otherwise, that there is reason to believe that such paper, writing, written instrument, book, or other document, is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefore, may order the Clerk of the Court, of which he is a Judge, to issue such *subpœna duces tecum* accordingly, and if such witness, after being duly served with such *subpœna duces tecum*, shall fail to produce any such paper, writing, written instrument, book, or other document, being in the possession or power of such witness, and described in such *subpœna duces tecum*, before and to such commissioner or commissioners, at the time and place in such subpœna stated, such failure being proved to the satisfaction of the said Judge, he may proceed to enforce obedience to the said process of *subpœna duces tecum*, or to punish the disobedience, in like manner as any Court of the United States may do in case of disobedience to a like process, issued by such Court, and when any such paper, writing, written instrument, book, or other document shall be produced to such commissioner or commissioners, he or they

shall, at the cost of the party requiring the same, cause to be made a fair and correct copy thereof, or of so much thereof as shall be required by either of the parties:

"*Provided*, That no witness shall be deemed guilty of contempt for disobeying any subpœna directed to him by virtue of this Act, unless his fees, for going to, returning from, and one day's attendance at the place of examination, shall be paid or tendered to him at the time of the service of the subpœna."

Thus far the modes of procuring testimony in the United States Courts are in close resemblance to those employed in our State Courts, but the 15th section of the Act of 1789 contains provisions of a more stringent nature than are known to our State practice. In our State Court when a party, after due notice, fails to produce a paper, the only remedy for the party calling for the paper is to introduce secondary evidence of its contents, but the 15th section of the Act of Congress of 1789, provides that "all Courts of the United States shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery, and if a plaintiff shall fail to comply with such order, to produce books or writings, it shall be lawful for the Courts respectively, on motion, to give the like judgment for the defendant, as in cases of nonsuit, and if a defendant shall fail to comply with such order, to produce books or writings, it shall be lawful for the Courts respectively, on motion as aforesaid, to give judgment against him or her by default."

This section, it has been held, does not destroy the right to introduce secondary evidence of the contents of a paper, but furnishes an additional means of securing the production of the paper.[a] When, therefore, a party in a cause

[a] Iasigi vs. Brown, 1 Curtis, 402.

wishes the production of papers supposed to be in the possession of the other, he must give him notice to produce them. If they are not produced, he may give secondary evidence of their contents, or may draw inferences from their non-production unfavorable to the party not producing them, or he may move for a non-suit or judgment by default as the case may be. But to entitle the party calling for the production of papers to a judgment by default or nonsuit, he must show that the papers contained evidence pertinent to the issue, and are in the possession of the opposite party, and that he had given notice to the opposite party, that if the papers were not produced, he would move the Court for an order upon the party in possession to produce them, or on failure so to do, to award a nonsuit or judgment by default.[a] The motion for a nonsuit or judgment by default can only be made after a non-compliance with the order of the Court for the production of the papers.[b] The application for an order to produce papers may be made on notice before trial, and in such case the correct practice seems to be, after the moving party has made a *prima facie* case, to enter an order upon the opposite party to produce at the trial the papers described in the motion, or to show cause at the trial why the same are not produced.[c]

The party in possession of papers cannot, however, be compelled to produce them until the trial has commenced.[d]

The party called on to produce papers may reply by his own affidavit denying his possession of the papers, and this may be met by contrary proof, according to the rules of equity.[e]

The defendant has the right in the State Court to move for a nonsuit, when in his opinion the plaintiff has failed to show a legal right to maintain the action; but in the case

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[a] Bas vs. Steele, 3 Wash. C. C., 381.

[b] Thompson vs. Selden, 20 How., 197.

[c] Iasigi vs. Brown, 1 Curtis C. C., 402.

[d] Hylston vs. Brown, 1 Wash. C. C., 298; Iasigi vs. Brown, 1 Curtis C. C., 402.

[e] Bas vs. Steele, 3 Wash. C. C., 381.

of Elmore vs. Green, 1 Pet., 469, it was held that a Circuit Court had no authority to order a peremptory nonsuit against the will of the plaintiff. That the plaintiff had a right by law to a trial by jury, and to have the case submitted to them. He might agree to a nonsuit, but if he did not so choose, the Court could not compel him to submit to it. It is competent, however, for the plaintiff in the United States Court, as in the State Court, voluntarily to take a nonsuit at any time before the verdict is published; and the defendant has the right when the plaintiff has closed his case, to move the Court to instruct the jury that if the evidence is believed by the jury to be true, the plaintiff is not entitled to recover, and in the language of the Court, such an instruction "makes it imperative upon the jury to find a verdict for the defendant."[a] The defendant thus obtains a better result from the granting of his instruction than he would from the granting of the nonsuit, as that would only abate the particular action, while the verdict under the instructions would destroy the cause of action. It is proper also to note the difference which exists between the practice of the United States Court, and that of the State Court relative to the reply in argument. The practice in the State Court is as has been seen, that the defendant omitting to offer evidence, entitles himself to the reply in argument.[b] A similar practice does not obtain in the United States Court, but the plaintiff opens and closes whether the defendant introduces testimony or not. Such is the rule in this District. The practice, however, varies in the different Districts.

All judgments obtained at the same time have equal rank, provided the judgment is entered up within five days after the party is entitled to the same. It may, however, be entered up at any time before the second term after, to take precedence from date. If not entered before the second term, they cannot be entered up without a motion at rules or in open Court.[c]

The judgment when duly entered up is a lien on real

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[a] Parks vs. Ross, 11 Howard, 362. [b] *Ante*, 26. [c] Rules 12 and 13.

estate or chattels real, in the same manner as judgments of the State Court, and cease to be liens in the same manner and at like periods as the judgments of the State Courts.[a] The preparatory step by which the judgment is obtained and the lien established, depend upon the practice of the Court, and that practice is settled by the Federal Courts under the power given, as has already been seen by the Acts of 1792 and 1828; but the judgment once obtained, the lien of it arises under and is regulated by the State laws. The lien is considered as a rule of property, and a rule of decision under the 34th § of the Judiciary Act; and as we have already seen,[b] the United States Courts conform to the rules of property established by the State laws.[c]

Interest is also allowed on the judgments, when by the laws of the State interest would be allowed on judgments in the State Courts.[d]

The judgment being entered up, the execution issues on the rule day next after the setting of the Court at which the judgment was obtained.[e] The plaintiff may take out a *ca. sa.* in the first instance;[f] or may issue *fi. fa.* and *ca. sa.* together, and proceed in such manner as to the issuing and renewal of executions, as is prescribed by the State laws of force in 1828. The 22nd Rule of Court, adopts the provision of the Act of the State of 1839, and provides that no new execution shall issue until that previously issued has been returned, except by special order of a Judge.

The execution is tested in the name of the Chief Justice of the United States and of the day of the adjournment of the Court, and is returnable to the next term of the Court. The form of the writ is the same as in the State Court.[g]

The executions run throughout the district, and under it

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[a] Act of 1840, § 5, Stat., 393.

[b] *Ante* page 101.

[c] Clements vs. Berry, 11 Howard, 411; Massingill vs. Downs, 7 Howard, 760.

[d] 1842, 8 §, 5 Stat., 518.

[e] 21st Rule of Court.

[f] Act of 1792, 2 §, 1 Stat., 276.

[g] Act of 1828, 3 §, 4 Stat., 281; see Appendix for form of writ.

a levy may be made on any property subject to levy by the State laws of force in 1828.

The 43d and 44th Rules of Court prescribe the duties of the Marshal in making sales of property, and for defaults in his official duty, the Marshal may be ruled in like manner as the State Sheriff; and is, in like manner, liable on his official bond to the parties injured. (See Act of 1789, § 27, 1 U. S. Stat., 87; Act of 1800, § 3, 2 U. S. Stat., 61; and Act of 1806, 2 U. S. Stat., 372, as to office and duties of Marshals.)

Subject to the exceptions above pointed out, the practice of the United States Court conforms to that of the State Court, and a reference to the preceding part of this work will indicate the proper course of proceeding in the different stages of a cause. The Rules of the Circuit Court for this District are contained in Miller's Compilation, and an examination of them will show how slightly they vary from those prescribed to the State Courts.

BAIL.

The right to hold to bail is left by the laws of Congress to be determined by the local laws and practice in each district. The local laws and practice which govern in this district, are such as were in force at the passage of the Process Act of 1792, subject of course to such modifications as have been introduced by Rule of Court.[a]

There is not, I believe, any difference between the practice of the Courts of the State and the Courts of the United States for this District, as to the proceedings to hold to bail.

In cases "sounding in contract," there must be an affidavit of the sum actually due attached to the writ, and an order endorsed thereon requiring bail to be taken.[b] The order of the plaintiff's attorney is sufficient. In all special cases the order of a Judge shall be obtained. The Act of Congress of 1812[c] gives to the commissioners appointed by

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[a] Miller's Compilation, p. 75. [b] Sixty-second Rule, Ibid.

[c] 1 ⅔, 2 Stat., 679; see also Payne vs. Drew, 4 East., 523; Hogan vs. Lucas, 19 Pet., 400; Taylor vs. Caryl, 20 Howard, 594; Ex parte, Dow, 3 Howard, 103.

the Circuit Court the same power to take acknowledgments of bail, as is possessed by the Judges, but there is no power as yet given to the commissioners to make an order for bail.

Although the right to hold to bail and the proceedings to hold to bail are the same in the Courts of the United States as of the State, there is a restriction upon the exercise of the right which arises in cases where jurisdiction of the State Court and of the United States Court attaches upon the same person. The fundamental principle upon which Courts entertaining jurisdiction over the same subject-matter act, is, that when there is equal jurisdiction, that which first attaches is exclusive, consequently when the defendant is in custody of the law under a process issuing from a State Court, he cannot be arrested by process issuing from the Court of the United States. In the case of Goodwin vs. Cohen & Cohen,[a] the defendants were arrested under *ca. sa.* issuing from State Court, and gave prison bounds bonds, and applied for insolvent debtors Act; subsequent to these proceedings, they were arrested on *ca. sa.* issuing from the United States Court. They moved to set aside the arrest, and it was held that the arrest was irregularly made; that the defendants were to be considered as in the possession of the Sheriff, under process of a Court of competent jurisdiction; that the possession of the Sheriff was exclusive, and that the execution of the *ca. sa.* by the United States Marshal could only be by an actual arrest of the body of the defendant, which arrest would interfere with the possession and impair the custody of the Sheriff. The motion was accordingly granted, and the arrest by the Marshal set aside.

The same principle was enunciated in the case of Lane & Co. vs. Bethea.[b] The defendants were in custody of Sheriff under *ca. sa.*, issuing from the State Court. A bail writ issuing from the United States Court, was directed to the Marshal, who arrested the defendant and took a bail bond A motion was made to set aside the arrest and cancel the bond, and it was held that in conformity to the principles

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[a] MSS. Decision per Magrath, J., 1858. [b] MSS. Decision per Magrath, J., 1858.

declared in Goodwin vs. Cohen & Cohen, that the Marshal had no power to make the arrest, and if none to make the arrest, none to require the bond, which is of course but a substitute for the body. The arrest was accordingly set aside, and the bail bond cancelled.

In the above cases the defendant was in custody of the Sheriff under *ca. sa.* at the time the process of the United States Court was executed upon them, and of course the positive authority of a decision is co-extensive only with the facts upon which it is made. The *principle* will, however, it is apprehended, apply to all cases where the defendant is in custody of the Sheriff, under process of the State Court, whether mesne or final, at the time that the process of the United States Court is executed.

The governing principle applicable alike to the Courts of the State and of the United States, is non-interference by either with the custody exercised by the office of the other under appropriate legal process directed to them, and whether the process is mesne or final, whether the defendant is in custody under bail writ or *ca. sa.* is, it is presumed, immaterial, for in either case there is an arrest, and if a subsequent arrest under process of another Court was permitted, the custody under the first arrest would of necessity be disturbed.

Although it has not been decided, and therefore cannot be laid down as law, I think it may be safely said that a defendant in custody of one Court, or under bail bond to appear and answer to that Court, cannot be arrested by process issuing from the other.

It is probable, however, that although the arrest could not be made, the process if lodged with the officer having custody of the defendant, would operate as a detainer, and it would be in abeyance so long as the prior arrest was in full force, but resume its active energy as soon as that prior arrest was discharged.

Bail are fixed by a return of *non est inventus* to a *ca. sa.* or *nulla bona* to a *fi. fa.* against the principal.[a] This is at vari-

[a] 64th Rule of Court.

ance with the existing State law. The validity of the rule was called in question before the Circuit Court for South Carolina in the case of Ross & Leitch vs. McIntyre.[a] It was held, however, that the bail bond and the proceedings upon it were not included in the proceedings upon writs of execution and other final process within the meaning of the Act of Congress of 1828, but were included in the "forms and modes of proceedings in suits at common law," according to the Act of Congress of 1792, and that to determine the question presented, resort must be had to what was the law of the State fixing the liability of the bail at that time, and that by the State law of 1785,[b] the plaintiff might on the return of *non est inventus* to a *ca. sa.* or *nulla bona* to a *fi. fa.* have a *sci. fa.* against the bail, and accordingly the sixty-fourth Rule was sustained as in conformity to the State law at the passage of the Act of Congress regulating the proceeding. Subsequent changes in the State law cannot as has already been stated, furnish any rule of operation for the Courts of the United States until such changes have been adopted by Act of Congress or the Rules of the Court.

APPEAL.

The party dissatisfied with the result of the suit may appeal, either by motion in arrest of judgment, or by motion for a new trial, or by writ of error.

The motion in arrest of judgment is addressed to the Circuit Court which heard the case, and is governed by the principles of the common law. A reference, therefore, to the standard text books on practice in Common Law Courts will furnish all that will be needed upon the subject. The time within which a motion in arrest of judgment can be made is limited by the fifteenth Rule of the Circuit Court for the District of South Carolina,[c] which prescribes that notice of the motion and the grounds thereof must be given within two days after the rendition of the verdict.

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[a] MSS. Decision per Magrath, J., 1858.

[b] 7 S. C. Stat., 215.

[c] See Miller's Compilation.

The motion for a new trial is by virtue of the Judiciary Act of 1789,[a] which provides "that all the said Courts of the United States shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in Courts of Law." The motion is addressed to the discretion of the Court which heard the cause, and from its judgment, granting or refusing a new trial, there is no appeal.[b]

The practice in moving for new trials is regulated by the Act of 1789,[c] which provides that, "when judgment upon a verdict in a civil action shall be entered, execution may, on motion of either party, at the discretion of the Court and on such conditions for the security of the adverse party as they may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the Clerk's office of said Court a petition for a new trial. And if such petition be there filed within said term of forty-two days, with a certificate thereon from either of the Judges of such Court that he allows the same to be filed, which certificate he may make or refuse at his discretion, execution shall of course be further stayed to the next session of the said Court."

The fifteenth Rule of Court requires that notice of a motion for a new trial, and "the grounds thereof," shall be given within two days after verdict. This rule, in connection with the subject of new trials, has never, so far as I am aware, received judicial construction, but it is clearly repugnant to the statute above cited. The rule requires notice, and the grounds of the motion within two days after verdict, and if the rule is valid, the omission to give the notice within the required time would deprive the defeated party of his appeal, but, on the contrary, the statute gives the right to appeal by motion for new trial, even after judgment "shall be entered;" the only limitation being that the execution shall not be stayed to allow

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[a] § 17, 1 U. S. Stat., 21.

[b] Life Insurance Co. vs. Wilson, 8 Pet., 303; U. S. vs. Daniel, 6 Wheat., 543; Barr vs. Gratz, 4 Wheat., 215; Henderson vs. Moore, 5 Cranch, 11.

[c] § 18, 1 Stat., 83.

the petition to be filed more than forty-two days from the time of entering judgment. The rule only allows the defeated party two days within which to allege the grounds upon which he moves. The Act allows forty-two days. In practice the fifteenth Rule of Court is ignored and the directions of the Act implicitly followed.

The petitions required by the Act should set forth clearly and distinctly the grounds upon which the party considers himself entitled to a new trial. When prepared, it is presented to the Judge who heard the cause, and it is in his discretion to allow it to be filed, or to refuse it. If he allows it, he signs it, and it is then filed in the Clerk's office, and the motion docketed for hearing at the next term.

The motions in arrest of judgment and for a new trial may be made simultaneously, but no motion in arrest of judgment will be heard after a new trial once granted.[a] Both these motions are irrespective of the amount involved in the litigation.

According to the English practice, a motion for a new trial is a waiver of a writ of error, and in some of the Circuits of the United States there is a rule to this effect, but the better doctrine seems to be, that a new trial is not a waiver of a writ of error, and even where by the rules of Court it is a waiver, effect can only be given to the rule by entering the waiver on the record before the motion for a new trial is heard.[b]

The third mode of appeal is by writ of error, and the appeal is addressed, not as in the two preceding modes to the Court which heard the cause, but is to the Supreme Court. The Judiciary Act[c] provides, "that final judgment and decrees in civil actions and suits in equity in a Circuit Court, brought there by original process, or removed there from Courts of the several States, or removed there by appeal from a District Court, where the matter in dispute exceeds the sum or value of two thousand dollars,

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[a] Rule 15. [b] U. S. vs. Hodge, 6 How., 284. [c] 1789, § 22, 1 Stat., 83.

exclusive of costs, may be re-examined, and reversed or affirmed in the Supreme Court upon writ of error, whereto shall be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by a Judge of the Circuit Court or Justice of the Supreme Court, the adverse party having at least thirty days' notice."

From this Act, it will be perceived that to entitle a party to carry a case up to the Supreme Court, two things must concur. The judgment must be a final judgment, and the matter in dispute must exceed the sum of two thousand dollars, exclusive of costs.

A final judgment is one which determines the particular cause; it need not finally determine the right,[a] and any proceeding in which a right is litigated between parties in a Court of Justice is a suit.[b]

The matter in dispute must exceed the sum of two thousand dollars, exclusive of costs. The amount actually in dispute between the parties at the time of the judgment is the criterion of the jurisdiction,[c] and the subsequent accrual of interest cannot be relied on to bring the sum within the jurisdiction.[d] When the plaintiff sues on a money demand, and claims in his pleadings more than two thousand dollars, and obtains a judgment for a smaller sum, the amount for which *judgment is rendered* is the only matter in dispute where the defendant appeals by writ of error. But if the plaintiff brings the writ of error, the amount claimed in *the pleadings* is the matter in dispute, for if the judgment of the Circuit Court is reversed, *non constat* that he may not recover the amount claimed in the declaration.[e]

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[a] Weston vs. City Council of Charleston, 2 Peters, 449; Holmes vs. Jennison, 14 Peters, 540.

[b] Ibid.

[c] Grant vs. McKee, 1 Peters, 248; Gruner vs. the U. S., 11 How., 163.

[d] Knapp vs. Banks, 2 How., 73.

[e] Gordon vs. Ogden, 3 Peters, 33; Knapp vs. Banks, 2 How., 73; Bennett vs. Butterworth, 8 How., 124.

Originally the writ of error issued from and was returnable to the Supreme Court, but it having been found inconvenient to apply to the Clerk of the Supreme Court for the writ to be issued to remote parts of the Union, it was provided by the Act of 1792[a] that the Clerk of the Supreme Court should transmit to the Clerks of the several Circuit Courts the form of a writ of error, to be approved by any two of the Judges of the Supreme Court, and the Clerks of the Circuit Courts were authorized to issue writs of error agreeably to such form, under seal of the Circuit Court, returnable to the Supreme Court.

The writ of error must be brought within ~~five~~ years after rendition of the judgment complained of, or, in case the person entitled to the writ be *non compos mentis*, *feme covert*, or imprisoned, then within ~~five~~ years, as aforesaid, exclusive of the time of such disability;[b] and the Judge, on signing the citation on any writ of error, shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect and answer all damages and costs if he fail to make his plea good.

In the ordinary course of proceeding, the judgment would be enforced by execution, and the debt satisfied before the cause could be heard by a Supreme Court. To prevent such a result, it is provided that the writ of error may operate as a *supersedeas* or stay of execution where a copy of the writ of error is lodged for the adverse party in the Clerk's office where the record remains, within ten days (Sundays excepted) after the rendition of the judgment complained of, and until the expiration of the above term of ten days, executions shall not issue in any case where a writ of error may be a *supersedeas*.[c]

The security which the Judge is required to take, before signing a citation on any writ of error, must be in the words of the Act, "good and sufficient security," and it is thus left to the Court to determine the sufficiency. The security taken is in the form of a bond, with approved

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[a] § 9, 1 Stat., 278. [b] 22 §, 1789, 1 Stat., 84. [c] 1789, 23 §.

sureties, to the defendant in error or appellee. Where the writ of error operates as a *supersedeas* of execution, the penalty of the bond must be sufficient to cover the amount of the judgment, the costs, and any damage which may be adjudged against him, should he fail in his appeal.[a] Where the writ does not operate as a *supersedeas*, the penalty need only be sufficient to cover the costs that may be awarded to the defendant in error.[b]

The writ is returnable to the Supreme Court, and there must be returned with it an authentic transcript of the record, an assignment of errors, and prayer for reversal. The errors which are corrected by the Supreme Court are errors in law. All that pertains to the facts, to the weight of testimony, the amount of damage, or to the conduct of the Jury, are matters cognizable only in the Court below on a motion for a new trial. In the Supreme Court, the rulings of the Judge upon points of law alone are subject to revision, and the Supreme Court will regard nothing else. It is, therefore, incumbent on the party who intends to seek in the Supreme Court a revision of the law applied to the case on the trial, to take care to raise the questions of law to be revised, and put the facts on the record for the information of the appellate tribunal, and if he omits to do so in any of the methods known to the practice of such Courts, he must abide the consequences of his neglect. Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a Court of Error, exercising jurisdiction according to the course of the common law.[c] It is, therefore, necessary to allude now to the proper mode of assigning the errors for the correction of which the case is to be carried to the Supreme Court, and of incorporating into the record the facts necessary to a proper comprehension of the legal points submitted for revision.

Where there is no dispute as to the facts, and consequently no necessity for any ruling of the Court in admitting or

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[a] Cartlett vs. Brodie, 9 Wheat., 553. [b] Act of 1789, § 22.

[c] Suydam vs. Williamson, 20 How., 433.

rejecting evidence, the facts may appear on the record by a special verdict, in which the jury find the facts and refer the law arising thereon to the Court, or a statement of them may be agreed upon by the parties and entered on the record, and submitted directly to the Court for its decision, without the intervention of a jury; or a general verdict may be taken subject to the opinion of the Court upon the facts agreed upon; and in either case the aggrieved party may bring error after final judgment, and have the questions of law, arising upon the facts thus placed upon the record, re-examined.

From what has been above stated, it will be seen that a writ of error will lie upon a judgment entered on an agreed statement of facts, signed by the counsel and entered on the record in the Court below. In this respect, the practice of the United States Court differs from the practice of the English Courts, for according to the latter, a writ of error will not in such case lie. The reason of the difference is, that according to the United States practice, the statement of facts is entered on the record, and the writ of error carries it up to the appellate tribunal; but by the English practice, there is nothing on the record but the general verdict, and consequently no means of ascertaining how far the rulings of the Court below are correct.[a]

In all of the modes of carrying up a case for revision above stated, the facts of the case are agreed upon, but it is evident that serious and embarrassing questions may frequently arise as to the admission or rejection of evidence to establish the facts, or upon the instructions of the Court to the jury, and it may be desirable to submit the rulings of the Court below upon these matters to the revision of the appellate tribunal. This can only properly be done by a bill of exceptions, which is the safest as it is the most comprehensive method of carrying up to the appellate tribunal for revision the errors supposed to have occurred on the trial below.

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[a] 3 Blackstone Com., 275; Tidd's Practice; United States vs. Eliason, 16 Peters, 299; Stimpson vs. Baltimore Railroad Company, 10 Howard, 329.

At common law, bills of exception on account of any incorrect conduct on the part of the Judge who had tried the cause at assize or *nisi prius*, were probably unknown or but little in practice.

The misdirections or mistakes of the Judge could, it is true, be corrected by a new trial, to be granted by the Judges *in banc;* but as the report of the Judge who had heard the cause was in practice conclusive as to what proceedings had been had at the trial below, it is evident that there was no protection to the suitor from the wilful or inadvertent misstatement of the proceedings by the Judge in his report.

To remedy this defect in the administration of justice, the statute of Westminster the 2nd[a] enacted that "when one that is impleaded before any of the Justices doth allege an exception praying that the Justices will allow it, which if they will not allow, if he that alleged the exception do note the same exception and require that the Justices will put to them seals for a witness, the Justices shall do so; and if one will not, another of the company shall. And if the King, upon complaint made of the Justices cause the record to come before him, and the same exception be not found in the roll, and the plaintiff show the exception written with the seal of a Justice put to, the Justice shall be commanded that he appear at a certain day either to confess or deny his seal; and if the Justice cannot deny his seal, they shall proceed to judgment according to the same exception as it ought to be allowed or disallowed."

Since that statute, if the Judge at *nisi prius* either in the admission or rejection of testimony, or in his directions or observations to the jury misstates the law, the counsel on either side who consider that such a mistake may prejudice his client, should immediately respectfully object or remonstrate, and state the grounds of his objection, referring briefly to authority or reasoning on the subject to show that the law is as he claims it to be. Should the opinion of the Court

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[a] 13 Ed. 1 C., 31.

still be adverse, the counsel may then publicly require the Judge to seal a bill of exceptions, stating the point on which he is supposed to err, or if he refuse so to do, the party may have a compulsory writ against him, commanding him to seal it,[a] if the fact alleged be truly stated, and if he return that the fact is untruly stated, when the case is otherwise, an action will be against him for making a false return. The bill of exceptions is in the nature of an appeal, examinable not in the Court out of which the record issues, for the trial at *nisi prius*, but in the next immediate Superior Court upon a writ of error, after judgment given in the Court below.[b]

Originally adopted as a means of obtaining from the Judge who presided at the trial on circuit, a fair and correct report of the proceedings, and of guarding against wilful or unintentional error, Bills of exception are now chiefly valuable as presenting in a concise form to the appellate tribunal the exact point for judicial determination, and constitute in the Courts of the United States the proper and appropriate mode of correcting the error of a Judge on the trial of a cause in the Circuit Court.

It lies in general for the improper admission or rejection of evidence,[c] but if the case is not tried by a jury, the *admission* of evidence, which was objected to, is not the subject of a bill of exceptions,[d] although the rejection of evidence which was tendered, is; the distinction being, that if evidence is improperly admitted, the appellate tribunal will reject it, but if the evidence is improperly rejected, the appellate tribunal has no means of ascertaining what it is or what would have been its influence on the case.[e]

It is however, the duty of a party excepting to the admission of evidence on the trial, to point out with precision the

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[a] Ex parte, Crane, 5 Pet., 190.

[b] Chitty general Practice, 4 vol., page 1; 3 Blackstone, 372; Suydam vs. Williamson, 20 Howard, 428.

[c] Chitty's Practice, 4—1; 2 Institute, 427.

[d] Field vs. The United States, 9 Pet., 202.

[e] Arthurs vs. Hart, 17 Howard, 12.

part objected to, so that the attention of the Court may be drawn to it, for if the exception cover any admissible evidence, it will be overruled;[a] and in framing the bill of exceptions, it is not sufficient simply to state that the evidence was objected to, but the nature and grounds of the objection must be stated.[b] And the appellant will be restricted in examining the admissibility of testimony, to the specific objection taken to it below, as the attention of the Court was only called to the objection then made, and on that alone was the ruling made.[c]

But in addition to the objection taken by counsel to the admission or rejection of testimony, there may be supposed error in the summing up of the Court, or in the instructions given by it to the jury, and a bill of exceptions is the proper mode of carrying their errors up to the Appellate Court for revision.[d]

The practice is for the counsel on each side at the close of the testimony and before argument, to submit to the Court a copy of the instructions which the Court will be asked to give the jury upon the law of the case, and the argument is then directed to establish the legal correctness of the instructions prayed for and their applicability to the facts. The Court may refuse to instruct the jury as requested, or may modify the instructions prayed for. In either case the counsel whose instructions are refused or modified, and who deems the refusal or modification injurious to his client, may except to the rulings of the Court in such particular and tender his bill of exceptions to the Court.

It is in no manner obligatory upon either party to pray for special instructions. It is optional with them to do so, or to leave the matter to the Court upon the arguments, and then file exceptions to the instructions given by the Court. But it is advisible to ask for special instructions wherever an appeal is contemplated, for thereby the legal proposition which counsel think applicable to the case are distinctly

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[a] Moore vs. Bank, 13 Pet., 302.
[b] Hinde vs. Lingworth, 11 Wheaton, 210.
[c] Camden vs. Doremus, 3 Howard, 515.
[d] See form in Appendix.

stated, the attention of the Court is specially called to them, and their correctness is argued to the Court, and in the event of a refusal to give them, there is no uncertainty as to what was asked. It is advisible also for another reason, for if a party does not ask the Court to instruct the jury upon a particular point of the case, it is no error that the Court omitted to so instruct them.[a] In order therefore to lay a foundation for an appeal, the party should ask the Court for the particular instruction, and if refused, the correctness of the refusal can then be tested before the appellate tribunal.[b] The instructions which are asked of the Court, should be on points of law pertinent to the issue,[c] for the Court cannot be asked to give opinions upon abstract legal propositions,[d] or on hypothetical questions which do not belong to the case.[e] It is only in the application of legal propositions to the testimony of the case that the Court can be asked to charge the jury, or exception taken to the ruling of the Court, nor can either party assume certain facts to be established and ask the Court to instruct the jury on those facts, for that would be to withdraw the decision on the facts from the jury. All that the Court can properly be asked to do, is to lay down the rule of law to be applied by the jury, according as they find the facts.[f] Great care should be taken by the counsel in framing the instructions, not only to present all the legal views which may be taken of the testimony in his favor, but to present them in an unobjectionable form; and when the foundation of the appeal is the refusal of the Court to grant a particular instruction prayed for, the highest caution is necessary, for it is not error in the Court to refuse the instruction prayed for, unless it ought to have prevailed in the very terms in which it was made.[g]

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[a] Pennock vs. Dialogue, 2 Pet., 1.

[b] Smith vs. Carrington, 4 Cranch, 71.

[c] Ibid.

[d] Brooks vs. Marbury, 11 Wheat., 94.

[e] Ellery vs. Bank of United States, 11 Wheat., 75.

[f] Patterson vs. Jenks, 2 Pet., 226.

[g] Violett vs. Patton, 5 Cr., 142; Brooks vs. Marbury, 11 Wheat., 94; Buck vs. Chesapeake Insurance Co., 1 Pet., 151.

When the Exception should be Tendered.—It is a settled principle that no bill of exceptions is valid which is not for matter excepted to at the trial, and it must appear by the manuscript of the record not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. The reason of such strictness in requiring the exception to be taken and noted before the jury retire from the bar, is that the Court, thus informed that exception is taken to its instruction to the jury, has the opportunity of reconsidering its opinion, or explaining it more fully to the jury. The bill of exceptions, whether to the rejection or admission of evidence, or to the instructions of the Court to the jury, need not be formally drawn and signed before the jury retire from the bar. It is sufficient if the exception is taken at the trial and noted with the requisite certainty by the Judge, and it may afterwards during the term, according to the rules of the Court, be reduced to form and sealed by the Judge, and such is in fact the general practice. The bill of exception may be reduced to form and sealed by the Judge after the expiration of the term by consent of the parties, or by order of the Judge made during the term, allowing the additional period within which to prepare it. But in all such cases the bill of exception is signed *nunc pro tunc*, and it purports on its face to be the same, as if actually reduced to form and signed pending the trial, and it would be a fatal error if it were to appear otherwise, for the original authority under which bills of exception are allowed has always been considered to be restricted to exceptions taken pending the trial and ascertained before verdict.[a]

Having shown when a bill of exceptions should be taken, and at what time it should be tendered, it remains to note what the bill of exceptions should contain.

The object of the bill of exceptions is to carry up to the

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[a] Walter vs. The United States, 9 Wheat., 657; Turner vs. Yates, 16 How., 29; Ex parte, Broadstreet, 4 Pet., 102; Phelps vs. Mayer, 15 How., 100.

appellate tribunal the points of law erroneously ruled by the Court below, in the rejection or admission of testimony, and in the instruction to the jury, for it is to errors in law alone that the attention of the appellate tribunal will be directed, it will not determine the weight or effect of evidence, or examine into it, to ascertain what facts are established by it, this is the duty of the subordinate tribunal. It is, therefore, improper to incorporate into the bill of exceptions any more of the evidence than is necessary to present the legal questions raised and noted at the trial;[a] and in like manner it is improper to place on the record the charge of the Court *in extenso*, only so much of it should be contained in the bill of exception as embraces matter of law complained of and excepted to at the trial.[b]

It has been seen that, although the exceptions must be noted at the trial and before the Jury retire, yet that the bill of exceptions is not formally settled until the trial is over. When formally prepared it is tendered to the Judge, who compares it with the exceptions tendered to him at the trial and his notes of the case, and if correct, signs and seals the bill of exceptions, as of the day the verdict was rendered. The writ of error is then drawn out,[c] and upon the security required by the Act being given, and approved by the Judge, is sealed by the Clerk of the Court and allowed by the Judge, who also signs it. When the writ of error operates as a *supersedeas*, a copy for the adverse party must be lodged in the Clerk's office, where the record remains, within ten days after the rendition of judgment. But whether the writ of error is to operate as a *supersedeas*, or not, a citation must in every case be issued and served. The citation[d] is directed to the adverse party, and is signed by the Judge who allows the writ of error, and bears

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[a] Graham vs. Bayne, 18 How., 60; York & Cumberland R. R. Co. vs. Meyers, 18 How., 251; Pennock vs. Dialogue, 2 Pet., 1; Zeller vs. Eckert, 4 How., 297.

[b] Zeller vs. Eckert, 4 How., 297; Evans vs. Evans, 7 Wheat., 426; Carver vs. Jackson, 4 Pet., 1; Ex parte, Crane, 5 Pet., 195.

[c] See form in Appendix.

[d] See form in Appendix.

date of the day of signature. It must be served at least thirty days before the return term of the writ. The service is by copy personally served upon the adverse party or his attorney. The service upon the latter is valid even though he has retired from the case subsequent to the rendition of the judgment.[a] Proof of the service must be made by affidavit of the party serving it, annexed to or endorsed on the original citation.

The writ of error, the bill of exceptions, the bond, and the original citation, with proof of service endorsed, being deposited with the Clerk of the Circuit Court, that officer makes out a transcript of the record, and of all the proceedings in the cause, under his hand and the seal of the Court, and the record must be a complete record, containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing.[b]

The transcript of the record, the original writ of error, the original citation with proof of service, and a copy of the bond to the defendant in error, are then sent to the Clerk of the Supreme Court, with directions to file the transcript and docket the cause. At the same time there must be sent to the Clerk of the Supreme Court the sum of two hundred dollars, or a bond for that amount with approved sureties, conditioned to satisfy to the Clerk of the Supreme Court his fees.[c]

The docketing of causes is regulated by the ninth Rule of the Supreme Court.[d] The appearance of defendant in error, the call of the docket, the briefs and abstracts of points and authorities, and the order of argument, are all regulated by the rules of the Supreme Court, which will be found in the Appendix.

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[a] United States vs. Curry, 6 How., 110.

[b] Rule 8, Supreme Court.

[c] See form of Bond in Appendix.

[d] See Appendix.

DISCHARGE OF INSOLVENTS.

We have seen that under the State insolvent laws a debtor in execution can obtain a discharge, by which not only is his body freed from arrest, but all judgments against him and all claims in suit are completely extinguished, and his future acquisitions not liable for their payment. No similar provision exists in the laws of the United States, but inasmuch as it has been stated in a previous part of this sketch that the Courts of the United States administer the laws of the States in which they hold their sessions, it remains to enquire how far the insolvent laws of a State are operative in the Courts of the United States, either as a plea in bar to a suit instituted, or to procure the discharge of a defendant in the custody of the Courts of the United States under a *ca. sa.*

There are few questions of constitutional law which have been more fully and ably argued, and hardly one upon which judicial opinions have been so equally divided. A careful and thorough examination of the subject would require a treatise. All that can be attempted consistently with the design of this work, is a statement of the leading principles decided, and a reference to the cases in which the law was declared.

The question was for the first time brought before the Court in the celebrated case of Sturges vs. Crowninshield.[a] It was an action in the Circuit Court of the United States for Massachusetts, upon two promissory notes, made by defendant in March, 1811, payable to plaintiff. The defendant pleaded his discharge under the insolvent law of New York, passed in April, 1811, and which discharged the debtor from all liability for any debt contracted previous to his discharge.

The eighth section of the first article of the Constitution of the United States provides that Congress "shall have power" to "establish uniform laws on the subject of bankruptcies throughout the United States." The first question

[a] 4 Wheaton, 122.

then that arose in the case was whether since the adoption of the Constitution of the United States any State had authority to enact a bankrupt law, or whether the power was exclusively vested in Congress. In the argument at the bar the attempt was made to discriminate between what were insolvent laws and what were bankrupt laws, and the power of the State to enact the one and not the other was earnestly pressed. In delivering the opinion of the Court, Chief Justice Marshall admitted the difficulty of any satisfactory discrimination between insolvent laws and bankrupt laws, and declining to enter into the delicate inquiry respecting the precise limitations which the several grants of power to Congress in the Constitution may impose upon the States, further than was necessary for the decision of the case before the Court, *held* that until the power to pass uniform laws on the subject of bankruptcies was exercised by Congress, the States had the right to pass a bankrupt law, provided that such law did not impair the obligation of contracts within the meaning of the tenth section of the eighteenth article of the Constitution of the United States.

The main question then arose, was the Act of New York which liberated the person of the debtor and discharged him from all liability for any debt previously contracted, on his surrendering his property in the manner prescribed—a law impairing the obligation of contracts.

What is a contract, and what the obligation of it, and the distinction which exists between matters which adhere to the obligation and those which merely pertain to the remedy to enforce the obligation, were fully and elaborately argued by the bar and discussed by the Court. The opinion delivered by Chief Justice Marshall, goes to the full extent of declaring such insolvent laws to be laws impairing the obligation of contracts; but the *judgment* of the Court, carefully guarded and limited in its terms, went simply to the point that the particular Act pleaded so far as it attempted to discharge the contracts on which the suit was instituted, was a law impairing the obligation of contracts, and the plea of a discharge under it, invalid. It was a decision on the particular case, and not a rule of law, which was de-

clared. As said by Mr. Justice Johnson, subsequently in the case of Ogden vs. Sanders, the "judgment partook as much of a compromise as of a legal adjudication."

In Sturges vs. Crowninshield, the Act was passed by the State of New York, *after* the making of the contract. In the next case which arose,[a] the State law under which the discharge was obtained, was passed before the contract was made. It was held, however, that this circumstance "made no difference in the application of the principle," and the case was decided in conformity to the ruling in Sturges and Crowninshield.

In both of the above cases the discharge under the State law was pleaded in bar of a suit brought in the United States Court, where of course the litigation was between citizens of different States; but in the next case which arose,[b] the question was between citizens of the State of Pennsylvania in the Courts of that State, and under a law of the State, passed as in Sturges & Crowninshield, *after* the contract was made. The Supreme Court of Pennsylvania sustained the law of the State, and held the plea of discharge under it valid. The case was carried by writ of error to the Supreme Court of the United States. That Court held that the case was not distinguishable from the cases already decided, except by the circumstances that the plaintiff and defendant were citizens of the same State at the time the contract was made, and remained such at the time the suit was instituted in its Courts, but that these facts made no difference; and the judgment of the Supreme Court of Pennsylvania was reversed, and thereby the plea of discharge declared invalid.

After the decision of these cases, the doctrine rested, until the case of Ogden vs. Sanders.[c] This is the leading case on the subject. The facts of it are as follows: Jordan, a citizen of Kentucky, drew bills of exchange upon Ogden, a citizen of New York, in favor of Sanders, a citizen of Kentucky. The bills were accepted by Ogden, who sub-

[a] McMillan vs. McNeil, 4 Wheaton, 209.

[b] Farmers & Mechanics Bank of Pennsylvania vs. Smith, 6 Wheaton, 131.

[c] 12 Wheaton, 214.

sequently failed, and procured his certificate of discharge under the insolvent laws of New York, and removed to Louisiana. Sanders brought his action on the bills in the United States Court for the District of Louisiana, and Ogden pleaded his discharge, and the cause came by writ of error to the Supreme Court of the United States.

From a mere perusal of the facts it would appear that the case was undistinguishable in principle from those already decided. A more critical examination of the facts, and comparison with the cases previously decided, will, however, show that the exact case made was never before submitted to the Court. The principles governing this class of cases had been declared by the Chief Justice in Sturges vs. Crowninshield, but, as already observed, those principles were not essential to the decision of that case, and had not received such confirmation from time or subsequent adoption as to give to them the weight of settled law. The whole field was open. The distinction which existed between bankrupt and insolvent laws, the exclusive power of Congress to pass bankrupt laws, the power of the States to enact them in the absence of any uniform law promulgated by Congress, what was a contract, what the obligation of it, what pertained to the contract, and what to the remedy, and the various modifications and incidents of the law governing contracts arising from our complex condition of sovereign States united in a federative Union, were all discussed, defined, criticised, and elaborated, by some of the ablest lawyers who have ever graced the Supreme Court. The Court itself was almost equally divided, Justices Washington, Johnson, Thompson, and Trimble, composing the majority, while Chief Justice Marshall, and Justices Story, and Duvall, composed the minority.

To show the difference between the case of Ogden and Sanders, and the cases previously decided, it is necessary briefly to state the facts of each.

In Sturges vs. Crowninshield, and in Farmers and Mechanics Bank vs. Smith, the Act was passed *after* the contract sued on was made. In McMillan vs. McNeil, the Act of Louisiana, under which the discharge was had, was

passed before the contract was made. But at the time the contract was made, neither plaintiff nor defendant were citizens of Louisiana, and, therefore, the law of Louisiana neither governed the contract nor the parties to it.

In the case of Ogden vs. Sanders, the contract (the acceptance) was made in New York, between a citizen of New York and a citizen of another State, and the discharge was under a law of New York, in force at the time the contract was made.

The decision was, that the insolvent or bankrupt law of a State discharging the person and future acquisitions of a debtor, is not a law impairing the obligation of contracts, so far as it respects contracts made *subsequent* to the passage of the law; and a certificate of discharge under it is valid in cases where the contract was made between parties, citizens of the State under whose law the discharge was obtained, and in whose Courts the certificate is pleaded. But a certificate of discharge under a State insolvent or bankrupt law is invalid and cannot be pleaded in bar of an action brought by a citizen of another State in the Courts of the United States.

The reasoning which supports this latter clause is, that the insolvent law of a State operating upon future contracts being constitutional, it is within the legislative power of the State to enact it, but that a State can legislate only over its own citizens and territory, and can, therefore, only grant a valid discharge as between its own citizens and in its own Courts, and could not effect by its legislation the citizens of other States.

"The provision in the Constitution," says Justice Johnson, "which gives the power to the general government to establish tribunals of its own in every State, in order that the citizens of other States or sovereignties might therein prosecute their rights under the jurisdiction of the United States, had for its object an harmonious distribution of justice throughout the Union; to confine the States, in the exercise of their judicial sovereignty, to cases between their own citizens; to prevent, in fact, the exercise of that very power over the rights of citizens of other States, which

the origin of the contract might be supposed to give to each State." The citizens of other States are thus exempted from the jurisdiction of the State tribunal, they cannot be forced into it or made amenable to laws enacted for its guidance by an authority to which they owe no allegiance.

"No one," says Mr. Justice Johnson (in the same opinion, page 367) has ever imagined that a prisoner in confinement under process from the Courts of the United States could avail himself of the insolvent laws of the State in which the Court sits. And the reason is, that those laws are municipal and peculiar, and appertaining exclusively to the exercise of State power in that sphere in which it is sovereign, that is, between its own citizens, between suitors subjected to State power exclusively, in their controversies between themselves.

"I, therefore, consider the discharge, under a State law, as incompetent to discharge a debt due a citizen of another State, and it follows that the plea of a discharge here set up is insufficient to bar the rights of the plaintiff."

The same ruling was made in the case of Boyle vs. Zacharie & Turner,[a] in which it was said by the Chief Justice, that "the principles established in the opinion of Mr. Justice Johnson, in the case of Ogden and Sanders, are to be considered no longer open for controversy, but the settled law of the Court." And to the same point is the case of Cook vs. Moffatt.[b]

In all of the above cases the action was instituted in the Courts of the United States, where, of course, the parties litigant were citizens of different States, and the discharge under the insolvent laws of a State invalid. If, however, the plaintiff, instead of litigating his rights in the Courts of the United States, goes voluntarily into the Courts of the State, under whose law the insolvent is discharged, he is bound by the discharge to the same extent as the citizens of the State are bound.[c]

From this review of the cases, it will be perceived that,

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[a] 6 Pet., 348; S. C., 6 Peters, 641.

[b] 5 Howard, 307.

[c] Ogden vs. Sanders, 12 Wheaton, 364; Clay vs. Smith, 3 Peters, 411.

while some of the principles declared in the cases anterior to Ogden and Sanders have been overruled or modified, the cases themselves have not been overruled. They still subsist as law, and, together with the case of Ogden and Sanders, constitute one system. From them, I think, the following conclusions may be deduced:

1st. That a State has the right to pass a bankrupt or insolvent law in the absence of any uniform law promulgated by Congress.

2d. That the insolvent law of a State which impairs the obligation of an *existing* contract, is unconstitutional and invalid.

3d. That the insolvent law of a State which discharges the person and future acquisitions of a debtor, is not a law impairing the obligation of contracts entered into *after* the passage of the Act, and is not unconstitutional; but it is binding only on its own citizens, and valid only in its own Courts.

4th. That a State insolvent law, although constitutional and binding on the citizens and Courts of the State enacting it, does not affect creditors or citizens of another State, and a certificate of discharge under it is not valid as a plea in bar, in the Courts of the United States, or the Courts of another State.

5th. That if a citizen of another State voluntarily submits himself to the Courts of a State, he is bound by the insolvent laws of that State to the same extent that a citizen of the State would be.

While, however, the Courts of the United States do not allow the discharge of an insolvent under the laws of a State to have any operative effect against proceedings in the Courts of the United States, the laws of the United States have provided for the discharge of a debtor from imprisonment under the *ca. sa.*, leaving, however, the lien of the *fi. fa.* unimpaired.

The authority to the Courts of the United States to grant a discharge from imprisonment, is by virtue of the Act of 1800, (2 Stat., 4,) the first section of the Act of 1839, (5

Stat., 321,) and the first section of the Act of 1841, (5 Stat., 410.)

These Acts comprise all the direct legislation of Congress upon the subject, and while they clearly authorize the discharge, and declare the effect of it, they leave the mode of obtaining the discharge a matter of some uncertainty. This is especially the case in this district. The applications for discharge have been rare, but few points have been presented for judicial construction, and nearly the whole practice governing the class of cases has yet to be moulded into form by the Court.

The first section of the Act of 1800 gives to the debtor in execution the benefit of the jail limits to the same extent

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Section 1. *An Act for the relief of persons imprisoned for Debt.—Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That persons imprisoned on process issuing from any Court of the United States, as well at the suit of the United States as at the suit of any person or persons in civil actions, shall be entitled to like privileges of the yards or limits of the respective gaols, as persons confined in like cases on process from the Courts of the respective States, are entitled to, and under the like regulations and restrictions.

Section 2. *And be it further enacted,* That any person imprisoned on process of execution issuing from any Court of the United States in civil actions, except at the suit of the United States, may have the oath or affirmation hereinafter expressed, administered to him by the Judge of the District Court of the United States, within whose jurisdiction the debtor may be confined; and in case there shall be no district Judge residing within twenty miles of the gaol wherein such debtor may be confined, such oath or affirmation may be administered by any two persons who may be commissioned for that purpose by the district Judge. The creditor, his agent or attorney, if either live within one hundred miles of the place of imprisonment, or within the district in which the judgment was rendered, having had at least thirty days previous notice by a citation served on him, issued by the district Judge, to appear at the time and place therein mentioned, if he see fit to show cause why the said oath or affirmation should not be so administered; at which time and place, if no sufficient cause, in the opinion of the Judge, (or the commissioners appointed as aforesaid,) be shown, or doth from examination appear to the contrary, he or they may, at the request of the debtor, proceed to administer to him the following oath or affirmation, as the case may be, viz: "You solemnly (swear or affirm) that you have no estate, real or personal, in possession, reversion or remainder, to the amount or value of thirty dollars, other than necessary wearing apparel; and that you have not, directly or indirectly, given, sold, leased, or otherwise conveyed to, or intrusted any person or persons with all or any part of the estate, real or personal, whereof you have been the lawful owner or possessor, with any intent to secure the same, or to receive or expect any profit or advantage therefrom, or to defraud your creditors, or have caused or suffered to be done any thing else whatsoever, whereby any of your creditors may be defrauded." Which oath or affirmation being administered, the Judge or commissioners shall certify the same under his or their hands

as is allowed to persons confined under process from the State Court, but it was declared by the Supreme Court, in the case of the United States vs. Knight,[a] that the right of a debtor to the benefit of the jail limits did not rest upon the Act of 1800, but upon the third section of the Act of 1828, and that the jail limits, to which a defendant in execution was entitled, were those fixed by the laws of the several States at the date of that Act, which, in this State, were three hundred and fifty yards in every direction from the prison walls.[b] The subsequent legislation of the State, extending the jail limits to the judicial district, have never been adopted by any Act of Congress or rule of Court, and, therefore, do not apply to defendants in execution, on

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to the prison-keeper, and the debtor shall be discharged from his imprisonment on such judgment, and shall not be liable to be imprisoned again for the said debt, but the judgment shall remain good and sufficient in law, and may be satisfied out of any estate which may then, or at any time afterwards, belong to the debtor. And the Judge or commissioners, in addition to the certificate by them made and delivered to the prison-keeper, shall make return of their doings to the district Court, with the commission, in cases where a commission hath been issued, to be kept upon the files and record of the same Court. And the said Judge, or commissioners, may send for books and papers, and have the same authority as a Court of record, to compel the appearance of witnesses, and administer to them, as well as to the debtor, the oaths or affirmations necessary for the inquiry into, and discovery of the true state of the debtor's property, transactions and affairs.

SECTION 3. *And be it further enacted,* That when the examination and proceedings aforesaid, in the opinion of the said Judge or commissioners, cannot be had with safety or convenience in the prison wherein the debtor is confined, it shall be lawful for him or them, by warrant under his or their hand and seals, to order the marshal or prison-keeper, to remove the debtor to such other place convenient and near to the prison as he or they may see fit; and to remand the debtor to the same prison, if upon examination or cause shown by the creditor, it shall appear that the debtor ought not to be admitted to take the above recited oath or affirmation, or that he is holden for any other cause.

SECTION 4. *And be it further enacted,* That if any person shall falsely take any oath or affirmation, authorized by this Act, such person shall be deemed guilty of perjury, and upon conviction thereof, shall suffer the pains and penalties in that case provided. And in case any false oath or affirmation be so taken by the debtor, the Court, upon the motion of the creditor, shall recommit the debtor to the prison from whence he was liberated, there to be detained for the said debt, in the same manner as if such oath or affirmation had not been taken.

SECTION 5. *And be it further enacted,* That any person imprisoned upon process issuing from any Court of the United States, except at the suit of the United States in any civil action, against whom judgment has been or shall be recovered, shall be

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[a] 14 Peters, 316.

[b] State Act, 1788, 5 Statutes, 78.

process issuing from the Courts of the United States, for, as we have frequently had occasion to see in the course of this sketch, State laws *proprio vigore* cannot control the proceedings in the Courts of the United States.

The benefit of the jail limits are obtained in the same manner as in the State Court, by giving bond to the Marshal not to transgress the limits, and it is *presumed* that the same distinction which exists in the State Court between arrest on mesne process and arrest on final process would be observed in the Courts of the United States, and a debtor on mesne process be, in like manner, allowed the benefits of the jail limits. Such seems to be the fair construction of the Act of 1839, which adopts the same "restrictions and conditions" upon imprisonment for debt as are provided by the State laws; but the point has never been ruled by the Court in this district.

The benefit of the jail limits being obtained, the next step is to obtain the discharge. And the debtor applying

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entitled to the privileges and relief provided by this Act, after the expiration of thirty days from the time such judgment has been or shall be recovered, though the creditor should not, within that time, sue out his execution, and charge the debtor therewith.

APPROVED, January 6, 1800.

An Act to abolish Imprisonment for Debt in certain cases.—Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person shall be imprisoned for debt in any State, on process issuing out of a Court of the United States, where by the laws of such State, imprisonment for debt has been abolished; and where by the laws of a State, imprisonment for debt shall be allowed, under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the Courts of the United States; and the same proceedings shall be had therein, as are adopted in the Courts of such State.

APPROVED, February 28, 1839.

An Act supplementary to an Act to abolish Imprisonment for Debt in certain cases—Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to abolish imprisonment for debt in certain cases, approved February twenty-eighth, eighteen hundred and thirty-nine, shall be so construed as to abolish imprisonment for debt, on process issuing out of any Court of the United States, in all cases whatever, where, by the laws of the State in which the said Court shall be held, imprisonment for debt has been, or shall hereafter be, abolished.

APPROVED, January 14, 1841.

for his discharge may claim it under the ten day or ninety Act, in the same manner as he could were the application pending in the State Court. Under whatever Act the discharge may be obtained, it, of course, only extends to the release of the person of the debtor. The Act of 1800, to a certain extent, regulates the proceeding, but it has been ruled by the Supreme Court that the Act of 1800 does not alone regulate the practice. The third section of the Act of 1828 provides, that "writs of execution and other final process, and the *proceedings thereupon*, shall be the same as are now used in the Courts of such State." These words, "proceedings thereupon," have been held by the Supreme Court[a] to "include all the laws which regulate the rights, duties, and conduct of officers in the service of such process, according to its exigency, upon the person or property of the execution debtor, and, also, all the exemptions from arrest or imprisonment under such process created by those laws;" or, as subsequently said,[b] they "include all the regulations and steps incident to the process, from its commencement to its termination, as prescribed by the State laws, so far as they can be made to apply to the federal Courts."[c]

By the Act of 1828, section 3, and the decisions construing it, the State laws of the several States in force at the passage of the Act, have been adopted by it as incident to the remedy, and as governing the proceedings. They are cumulative, and in addition to the Act of Congress of 1800, both being in force.[d]

But while it is said that the proceedings upon final process in the Courts of the United States are to be the same as existed in the State Courts at the passage of the Act of 1828, and that the exemptions from arrest or imprisonment under the State laws then in force, apply equally to defend-

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[a] Beers vs. Houghton, 9 Peters, 362.

[b] Duncan vs. Dart, 1 How., 304.

[c] See also U. S. vs. Knight, 14 Peters, 301; Amis vs. Smith, 16 Peters, 312.

[d] Duncan vs. Dart, 1 How., 310.

ants in the United States Courts, it must be borne in mind that these State laws do no more than furnish a rule of practice to the United States Courts, and can by no means make the result of proceedings under them binding on the Courts of the United States. This question was presented to the Circuit Court for this district in the case of Hunt vs. Cohen & Cohen. The defendants had been arrested under *ca. sa.* issuing from the State Court, and had been discharged under the State law. The effect of the discharge according the State Act of 1759, is to exempt the debtor from suit for twelve months after the discharge. Before the twelve months had expired, the defendants were arrested under *ca. sa.* issuing from the Courts of the United States. The defendants moved that the arrest by the Marshal be set aside, contending that as the Act of 1828 adopted the proceedings in the State Courts, and the exemptions from imprisonment and arrest allowed by the State laws, they were equally exempt from arrest in the United States Court. But after an elaborate review of the cases, Magrath, J., delivering the opinion of the Court, said: "The proposition is specious but unsound. The Act of 1828 only says that as in the Courts of the State a discharge shall protect from its process the person relieved, so in the United States Courts a discharge by it according to the laws of the State, shall protect from its process, the person discharged by its order. Beers vs. Haughton,[a] has decided that the Court may by a rule adopt the result of the action of a State Court, and if the Court can do so by a rule, Congress can do so by an Act. But no such rule is in this Court, and no such Act of Congress has been passed, and without them the Act[b] must be taken to mean, that the same proceedings are to be taken so far as they can be, and the same discharge granted, so far as it can be; but these proceedings and that discharge are to take place and be given in the Courts of the United States, and relate only to its own proceedings and those affected by them. The Courts of the State and of the

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[a] 9 Peters, 359.

[b] Of 1828.

United States are independent of each other, neither can control the other, and in the recognition of their mutual independence is to be found one of the chief elements of the good which they were formed to produce, and I now hold that although the form of process and modes of proceeding are the same, yet the jurisdiction from which they issue, by which they are ordered, and for the satisfaction of the judgments of which they are directed, is essentially separate and distinct. In the true and just exercise of the powers with which they are each clothed, the lines in which they move are parallel and never meet." The defendants were accordingly ordered to institute proceedings in the United States Courts if they desired to obtain a discharge from the arrest under the *ca. sa.* issuing from the United States Court.

The practice regulating the proceedings to obtain the discharge is the same as in the State Court, and all the modes of exception or defense furnished by the State law to the creditor or debtor, can be used to the same extent and in like manner in the Courts of the United States as in the State Court.

APPENDIX.

Below will be found a few forms showing the mode of stating the cause of action in the writ. Ex Contractu.

To answer to (*plaintiff*) in a plea of trespass on the case, &c., as also for certain promises and assumptions by the said (*defendant*) to the said (*plaintiff*) made and not performed to the damage of the said (*plaintiff*) one thousand dollars.[a] Assumpsit.

To answer to (*plaintiff*) in a plea that he render to him the said (*plaintiff*) the sum of ——[b] dollars, which to him he owes, and from him unjustly detains to his damage ten cents. Debt. [On Bond.]

To answer to (*plaintiff*) who hath survived one A B, deceased in a plea, &c. Same by surviving obligee.

To answer to (*plaintiff*) assignee of —— Sheriff of Charleston district, according to the form and effect of the statute in such case, made and provided in a plea, that, &c. Debt on bail Bond by assignee. Of Sheriff.

To answer to (*plaintiff*) in a plea, that he render to him the sum of five hundred dollars,[c] which to him he owes, and from him unjustly detains to his damage one thousand dollars.[d] Debt on sealed note.

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[a] The damages should be laid at double the sum due.

[b] The penalty of the bond.

[c] The face of the note.

[d] When the debt is secured by a penalty, as in the case of bonds, the damages laid are nominal; but when the action is for the specific debt, the damages should be laid at a sum sufficient to cover interest; and it is usual to lay them at double the debt, as in assumpsit. See Chitty's Pleading, 1, page 108, title, Debt.

On judgment. To answer to (*plaintiff*) assignee of Samuel Brass, in a plea of debt, that he render to him the sum of five hundred dollars, which the said Samuel Brass, in the year of our Lord, 1855, by the consideration and judgment of the Court of Common Pleas of said State at Charleston, for the district of Charleston, recovered against the said (*defendant*), and afterwards assigned to the said (*plaintiff*), which said sum the said (*defendant*), to him the said (*plaintiff*) owes, and from him unjustly detains to his damage one thousand dollars.

Covenant. To answer to (*plaintiff*) in a plea that he perform to him, the said (*plaintiff*), the covenant between them, made according to the form, force and effect of a certain indenture of release to the said (*plaintiff*), by the said (*defendant*) made, and which the said (*defendant*) hath lately broken, to the damage of the said (*plaintiff*) one thousand dollars.

Detinue. To answer to (*plaintiff*), in a plea that he render to him (*here insert chattels for which action is brought*), being of the value of —— dollars, which from him he unjustly detains.

Ex delicto Case. To answer to (*plaintiff*) in a plea of trespass on the case, &c., to the damage of the said (*plaintiff*) one thousand dollars.

Slander. To answer to (*plaintiff*) in a plea of trespass, on the case, &c., and also for certain false, malicious and defamatory words spoken by the said (*defendant*) of and concerning the said (*plaintiff*), to his damage one thousand dollars.

Libel. To answer to (*plaintiff*) in a plea of publishing of and concerning the said (*plaintiff*) a certain false, scandalous and defamatory libel to the damage of the said (*plaintiff*) one thousand dollars.

To answer to (*plaintiff*) in a plea, wherefore with force and arms, he, the said (*defendant*), at Charleston, in the district of Charleston and State aforesaid, upon the said (*plaintiff*) did make an assault,

and him, the said (*plaintiff*), did wound and ill-treat, and other wrongs and enormities to him, then and there did against the peace and dignity of the State aforesaid, and to the damage of the said (*plaintiff*) one thousand dollars. Trespass to the person.

Upon a certain slave named Joe, the property of the (*plaintiff*), and *so on as above, laying the damages to the* (*plaintiff*.) Same on slave.

Wherefore, with force and arms, he, the said (*defendant*), (*state cause of action according to the circumstances*), and severely injured, bruised, damaged and destroyed the said (*chattels, specifying them*), the property of the said (*plaintiff*) as aforesaid, to his damage one thousand dollars. Same to personalty.

To answer to (*plaintiff*) in a plea of trespass, wherefore, with force and arms, the said (*defendant*) broke and entered the close of the said (*plaintiff*), in —— parish, in the district of —— and State aforesaid, and the fences in said close did pull and break down, and did break, cut down, dig up, and destroy the timber, trees, grass and earth of him, the said (*plaintiff*), within the said close then growing and being and of great value, and other wrongs and enormities then and there did against the peace and dignity of said State, and to the damage of the said (*plaintiff*) one thousand dollars. Same to realty.

By the Act of 1791, 5 Stat., 170, the action of ejectment is abolished, and "the method of trying the title to land or tenements" ordered to be by trespass. The writ is the ordinary writ above given, of trespass *quare clausum fregit*, the plaintiff or his attorney endorsing on the original and copy writ, a notice that the action is brought to try the title, as well as for damages. See Act of 1791, 7 Stat., 270. Trespass to try title.

To answer to (*plaintiff*) in a plea of trespass on the case, &c., and also for the disposing and converting to his own use, of a certain negro slave, named Trover.

Thomas, of the proper goods and chattels of the said (*plaintiff*), to the damage of the said (*plaintiff*) one thousand dollars.

If the writ is

By or against an executor. To "summon" or "to answer to" A B, executor of the last will and testament of N M, deceased.

By or against Administrator. To "summon" or "to answer to" A B, administrator of all and singular the goods and chattels, rights and credits, which were of N M, deceased, at the time of his death, who died intestate.

By or against administrator, *de bonis non*. To "summon" or "to answer to" A B, administrator of all and singular the goods and chattels, rights and credits, which belonged to G W, deceased, at the time of his death, who died intestate, unadministered by E F, also deceased, late administrator of the said G W.

By infant, per guardian. To answer to A B, an infant, who sues this action by C D, his guardian, duly appointed in a plea, &c.

By surviving copartners. To answer to P G & T M, who have survived one G W in the lifetime of the said G W, copartners in trade under the name and firm of P G & Company in a plea, &c.

The declaration and pleadings must of course vary according to the cause of action, and the proper precedents will be found in the works on pleading.

Printed forms of the judgments in general use are in the hands of every lawyer, and nothing need be said as to the proper mode of filling them up.

The executions both of *fi. fa.* and *ca. sa.* require no explanation as to the proper mode of filling them up, except in the single instance of *fi. fa.* vs. Executor or Administrator, who is liable *de bonis propriis*, the form of which is as follows:

THE STATE OF SOUTH CAROLINA:
To all and singular the Sheriffs of the said State—Greeting.

You, and each of you, are hereby commanded, without delay, that of the goods, chattels, houses and lands, and other hereditaments and real estates *which were of C D*, at the time of his death, in the hands of G W, executor of the last will and testament of C D, deceased, you cause to be levied a certain debt of

which

in the Court of Common Pleas, before the Justices of the said Court, at lately recovered against the said C D. AND ALSO, for damages, which sustained, as well by reason of the detention of the said debt, as for costs and charges, by expended in and about prosecuting suit in that behalf, whereof the said C D is convicted, as appears on record: if he have so much of the goods and chattels, houses, lands and other hereditaments and real estates of the said C D in his hands to be administered; or if he have not, then that you cause the said debt, damages, costs and charges to be levied of the proper goods and chattels, houses, lands and other hereditaments and real estates of the said G W.

And that you have the money before the said Justices of the said Court of Common Pleas, to be holden at on the in next, to render to the for debt, damages, costs and charges aforesaid.

And have you this writ before the Clerk of the said Court, at according to law.

WITNESS, *Esquire, Clerk of the said Court, at the day of in the year of our Lord one thousand eight hundred and , and in the year of the Sovereignty and Independence of the United States of America.*

Plaintiff's Attorney.

Sci. fa. vs. Executor, to assess damages after interlocutory judgments. See *ante*, page 28.

THE STATE OF SOUTH CAROLINA:

To all and singular the Sheriffs of the said State—Greeting.

Whereas A B, lately in the Court of Common Pleas for the district of Charleston and State aforesaid, on the day of A. D., 18 , impleaded C D, in an action on promises, (*or of debt, &c., as the case may be,*) declaring against him in the same action; for that whereas, &c., (*here recite the declaration,*) to the damages of the said A B $, as he said, and therefore he brought his suit, &c. And such proceedings were thereupon had in the said Court of Common Pleas, that afterwards, to wit: on the day of A. D. 18 , it was considered by the said Court that the said A B ought to recover his damages on occasion of the promises. And afterwards and before the issuing of a writ of inquiry for assessing the said damages, the said C D died, having first duly made and published his last will and testament in writing, and thereby constituted N M executor thereof, who after the death of the said C D, duly proved the said last will and testament of the said C D, and took upon himself the execution thereof, (*or if C D died intestate, say* died intestate, and administration of all and singular the goods, chattels and credits which were of the said C D, at the time of his death, was granted to N M,) as now appears. Wherefore the said A B hath humbly besought the said Court to provide him a proper remedy in this behalf, and the said Court being willing that what is just in this behalf should be done, command you, and you and each of you are hereby commanded, that by good and lawful men of your and each of your respective districts, you make known to the said N M, executor as aforesaid, (or administrator,) that he be and appear before the Justices of the said State at the Court of Common Pleas, to be holden at Charleston for the District of Charleston, on the day of next, to show cause, if any he has, why the damages in the said action should not be assessed and recovered by the said A B, and further

to do and receive what the Justices of the said Court shall then and there consider of him in this behalf.

And have you this writ before the Clerk of the said Court at Charleston, fifteen days next before the sitting thereof.

WITNESS *D H, Clerk of the said Court at Charleston, the day of in the year of our Lord one thousand eight hundred and , and in the year of the Sovereignty and Independence of the United States of America.*

Plaintiff's Attorney.

In the above form the defendant dies before writ of inquiry executed, and the *sci. fa.* is against his representatives. If the plaintiff dies, the *sci. fa.* is issued by his representatives, and the form above is altered to that extent.

ATTACHMENT WRIT.

THE STATE OF SOUTH CAROLINA, }
CHARLESTON DISTRICT. }

The State of South Carolina:

To all and singular the Sheriffs of the said State—Greeting:

You, and each of you are hereby required and commanded, immediately to attach the moneys, goods, chattels, debts and books of account, as also the lands, leasehold estates, and chattels real of C D, who is absent from and without the limits of this State, (as it is said,) in the [L. S.] hands, power, or possession of any person or persons whomsoever, within your, and each of your respective districts, so as to make *him* a party in Court before the Justices of the Court of Common Pleas, at a Court to be holden at the Monday next, to answer to A B, in a plea of trespass on the case, &c., (*as in assumpsit, or to a plea of debt, &c., as the cause of action may require,*) pursuant to the direction of the Act of the General Assembly of the said State, in such case made and provided; and, that at such time as you do execute this

writ, you do summon the person, or persons, in whose hands the said moneys, goods, chattels, debts and books of account, lands, leasehold estates and chattels real, shall be, by serving him, her, or them, with a true copy of this writ, with a notice endorsed thereon, requiring him, her, or them, to be and appear before the said Justices, at the Court of Common Pleas, to be holden at the Monday next, as aforesaid, to show cause why the said moneys, goods, chattels, debts and books of account, lands, leasehold estates and chattels real, should not be adjudged to belong to the said C D, the absent debtor.

But, if no person is present at the time of your attaching any of the things aforesaid, then and in such case, you are commanded to affix up at the prison door, a true copy of this writ, with an account of the things attached, and to give notice thereof in the gazette; and in the case there be no gazette, then you are required to publish the same at the door of the house where the Courts of judicature are, or shall be usually holden, for any person or persons, claiming the same, to appear and show cause as aforesaid, pursuant to the direction of the aforesaid Act of the General Assembly.

And, you are further required, to seize and take possession of all property of the absent debtor, which shall be attached by service of this writ of foreign attachment, in the hands, possession, custody, power or control of any person or persons, who shall not, on oath, claim the same as creditor in possession, or enter into bond, with good and sufficient surety, to the said Sheriff, his successors in office, or assigns, for the use of the plaintiff, not to waste or eloign the said property so attached, and to render a schedule thereof, on oath, to the said Sheriff, and to make due return to the said writ according to law, and to surrender the property thus attached, when thereto required by law, or by any order of Court made in pursuance of the attachment laws.

And further, to do in the premises what the said Justices, at the said Court, shall then and there think fit to order; and there bring then the said moneys, goods, chattels, debts

and books of account, and also an account of all such lands, leasehold estates and chattels real.

And have you this writ before the Clerk of the said Court, at fifteen days next before the sitting thereof.

WITNESS, *Esquire, Clerk of the said Court, at the day of in the year of our Lord, one thousand eight hundred and , and in the year of the Sovereignty and Independence of the United States of America.*

Plaintiff's Attorney.

On the copy writ is endorsed a notice to the garnishee, as follows:

To K L.

You are served with this writ, or process, to the intent that you may personally be and appear before the Justices of the Court of Common Pleas in at the return thereof, being the day of next, in order to show cause, if any you have, why the moneys, goods, chattels, debts, books of account, lands, leasehold estates and chattels real, now attached in your hands, should not be judged to belong to the within named C D, pursuant to the direction of the Act of the General Assembly of this State, in that case made and provided.

Plaintiff's Attorney.

RETURN OF GARNISHEE TO WRIT OF ATTACHMENT.

STATE OF SOUTH CAROLINA, CHARLESTON DISTRICT. } In the Common Pleas.

A B
vs. } Foreign Attachment.
C D.

K L, upon whom a writ of attachment in the above entitled cause hath been served, being duly sworn, makes return thereto, and says that he has not now, nor had he at the time of the service of the said writ, nor has he at any time since had in his hands, possession, custody, power or control

any moneys, goods, chattels, debts, books of account, land, leasehold estates or chattels real of, or belonging to the said C D,* except the following.

[*Here state the property, if any, of the absent debtor, which the garnishee has.*]

That the said C D is indebted to this deponent in the sum of dollars by his promissory note, dated the 1st day of January, A. D. 1858, and payable ten days after date, and now due and unpaid, (*or state the indebtedness according to the facts,*) and the deponent claims and holds the property hereinabove enumerated as creditor in possession.

K L.

Sworn to before me
&c., &c., &c.

The return being filed, the following order should be moved, two days' notice being given to plaintiff or his attorney:

A B
vs. } Foreign Attachment.
C D.

K L, the garnishee in the above entitled cause, having duly filed his return to the said writ on motion of attorney of the said garnishee, it is ordered that the said K L be discharged from further liability upon said attachment.

(Signed by the Judge.)

If garnishee fails to make return, then the following order should be taken:

A B
vs. } Foreign Attachment.
C D.

K L, upon whom a writ of attachment in the above entitled cause was duly served on the day of A. D. having failed to make any return thereto, on motion of , plaintiff's attorney, it is ordered that the said A B have leave to enter up judgment against the

*If garnishee has no property of the absent debtor, the above form is followed to *, then add: Wherefore the defendant prays to be discharged, and that his reasonable costs and expenses in making this return be allowed him.

said K L, as defaulting garnishee for the debt and costs due to him, the said A B, by the said C D.

The judgment is then entered up.

THE STATE OF SOUTH CAROLINA, }
CHARLESTON DISTRICT. }

Be it remembered, that heretofore, to wit, on the day of in the year of our Lord A B sued out of the Court of Common Pleas for the district aforesaid, a writ to attach the moneys, goods, chattels, debts and books of account, land, leasehold estates and chattels real of C D, who was absent from and without the limits of the said State, so as to make him a party in the said Court to answer to the said A B in a plea, &c., (*following the writ,*) which said writ was on the day and year aforesaid, duly lodged in the office of the Sheriff of Charleston district. And on the day of in the year aforesaid, a copy thereof was duly served upon K L, commanding him to show cause, if any he had, why the moneys, goods, chattels, debts and books of account, land, leasehold estates and chattels real, then attached in his hands, should not be adjudged to belong to the said C D, to which said writ of attachment the said K L made no return. Whereupon it was ordered by the Court of Common Pleas for the District aforesaid, on the day of A. D. that the said A B have leave to enter up judgment against the said K L for his debt and costs due to him by the said C D; and whereas the said A B hath by the judgment of the said Court recovered against the said C D the sum of dollars, as well for (*the nonperformance of the promises, &c., or for the debt according to the cause of action,*) as for his costs and charges by him in and about the said suit in that behalf expended, whereof the said C D is convicted, as appears on record. Therefore it is considered that the said A B do recover against the said K L the said sum of dollars, so recovered against the said C D as aforesaid, and also the sum of dollars for his costs and charges by him expended in and about prosecuting his suit in this behalf, and now by

the said Court to him with his assent, adjudged which said damages, costs and charges amount in the whole to dollars. And be the said K L in mercy, and so forth.

Plaintiff's Attorney.

PETITION FOR INSOLVENT DEBTORS ACT.

STATE OF SOUTH CAROLINA, }
DISTRICT. }

To the Honorable the Judges of said State:

The petition of A B respectfully showeth unto your Honors, that he is in custody of the Sheriff of district, at the suit of C D, (*or if under ca. sa., state* under an execution of *capias ad satisfaciendum* issuing out of the Court of for the district of at the suit of C D,) that he is willing and desirous to surrender all his estates and effects, a full schedule whereof is hereto annexed, and that he prays the benefit of the Act of the Legislature for the relief of insolvent debtors, and that the usual orders in the premises may be made, and your petitioner, as in duty bound, will ever pray, &c.

FORMS IN UNITED STATES COURT.

SIXTH CIRCUIT OF THE UNITED STATES OF AMERICA, }
SOUTH CAROLINA DISTRICT. }

The President of the United States of America:
To the Marshals of the said District—Greeting:

You are hereby commanded, without delay, to attach the body of A B, *a citizen of the State of South Carolina* wheresoever he may be found within the aforesaid district, so that you compel him to be and appear before the Clerk of the Circuit Court of the United States of America, for the aforesaid Circuit and District, at the rules, to be holden at Charleston in the aforesaid district, on the first Monday in December[a] next, to answer to C D, *a citizen of the State*

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[a] The rule day, next after the issuing of the writ.

of Virginia, in a plea of trespass, on the case, &c., as also for certain promises and assumptions by the said A B to the said C D, made and not performed, to the damage of the said A B, five thousand dollars.

And have you then and there this writ.

WITNESS *the Honorable Roger B. Taney, Chief Justice of the United States of America, at Greenville,*[a] *in South Carolina, district aforesaid, the tenth day of August,*[b] *in the year of our Lord one thousand eight hundred and sixty, and in the eighty-fifth year of the Sovereignty and Independence of the United States of America.*

Plaintiff's Attorney.

If plaintiff or defendant are aliens, state the fact thus: "To attach the body of," or "to answer to" *C D, an alien and subject of the Queen of Great Britain and Ireland.*

If plaintiff or defendant is a corporation "to summon," or "to answer to" *The South Carolina Railroad Company, a body corporate by Act of the General Assembly of the State of South Carolina.*

THE DECLARATION.

THE UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA. } In the Circuit Court.

A B, a citizen of the State of South Carolina, was attached to answer to C D, a citizen of the State of Virginia, (or an alien, or a corporation as the case may be, strictly following the language of the writ,) in a plea, &c., (then continue as in the State Court, bearing in mind, however, that if the action is on a promissory note or chose in action, in favor of an assignee, the declaration must aver the citizenship of the assignor, so as to show that he had the right to sue in the United States Court.[c])

The plea and all subsequent pleadings are in form the same as in the State Court.

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[a] The place where the Circuit Court last held its session.

[b] Some day in the preceding term of the Circuit Court.

[c] See *ante* page 97.

If there is default, and interlocutory judgment is entered, damages are assessed by reference to Clerk, or by writ of inquiry, executed in like manner as in State Courts, and substantially the same form used in entering final judgment as in the State Courts, the variations being only sufficient to adapt it to the United States Court. The following Postea will show the variations needed.

POSTEA AND JUDGMENT ON ISSUE TRIED, AND VERDICT FOR PLAINTIFF.

Therefore, it is commanded, that the United States Marshal, in and for the district of South Carolina, do summon forty-eight good and lawful men, to be drawn by ballot, according to law, to be and appear before the Justices of the said Court, to be holden at on the day of next, by whom, and so forth; and who neither, and so forth; to recognize, and so forth; because as well, and so forth; and the same day given to the parties aforesaid, at the place aforesaid. And afterwards that is to say, on the day, and at the place aforesaid, before the Justices aforesaid, come as well the said (*Plaintiff*) by *his* attorney aforesaid, as the said (*Defendant*) by *his* attorney aforesaid, and the jurors aforesaid, being demanded, some of them, to wit:

come, and being drawn by ballot, according to law, and sworn of the jury aforesaid, to say the truth of the within contained, do, on their oath, say, that *the said defendant did promise and assume in manner and form* as the said (*Plaintiff*) above in *his* declaration has alleged against *him*, and they assess the damages of the said (*Plaintiff*) by reason of *the non-performance of the said promises* over and above *his* costs and charges by *him* about *his* suit in this behalf expended, to

Therefore, it is considered that the said (*Plaintiff*) do recover against the said (*Defendant*) the damages so found by the jurors aforesaid: and also for *his* costs and

charges aforesaid, to the said (*Plaintiff*) by the said Court, now herewith *his* assent adjudged; which said damages, costs and charges, amount in the whole to

and be the said (*Defendant*) in mercy, and so forth.

Plaintiff's Attorney.

Judgment signed and entered, this day of A. D. 18

UNITED STATES COURT—FI. FA. IN CASE.

THE UNITED STATES OF AMERICA, }
SOUTH CAROLINA DISTRICT. }

To ———, *United States Marshal,*
or any of his lawful Deputies—Greeting:

You, and each of you, are hereby commanded without delay, that of the goods, chattels, houses and lands and other hereditaments, and real estates, of

you cause to be levied the sum of
which
in the Circuit Court of the United States, for the said district, lately recovered against the said

for damages which sustained, as well by reason of certain promises and assumptions, by the said
to the said
made and not performed,
as also the sum of for his costs and charges, expended in and about prosecuting suit in that behalf, whereof the said
convicted as appears on record.

And also, that you cause to be levied the interest upon the principal of said debt, from the day of
in the year of our Lord one thousand eight hundred and
(the day on which judgment is entered in this case) up to the day on which levy shall be made, and satisfaction entered on this execution:

And that you have the money before the Justices of the said Court, to be holden at[a] on the[b] next, to render to the said for damages, costs and charges aforesaid.

And you have this writ before the Clerk of the said Court, at[a] according to law.

WITNESS, *the Honorable Roger B. Taney, Chief Justice of the United States, at*[c] *the*[d] *in the year of our Lord one thousand eight hundred and and in the year of the Sovereignty and Independence of the United States of America.*

Plaintiff's Attorney.

FEDERAL COURT—CA. SA. IN CASE.

THE UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA.

To ———, *United States Marshal, or any of his lawful Deputies:*

You, and each of you, are hereby commanded without delay, to take the bod of wheresoever may be found, within your and each of your respective districts, and safely keep, so that you have bod before the Justices of the Circuit Court of the United States, for the district of South Carolina, at a Court to be holden at[a] on the[b] day of next, to satisfy to the sum of which before the Justices of the said Court at lately recovered against the said for damages which sustained, as well by reason of the non-performance of certain promises and assumptions by the said to the said lately made, as for

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[a] The place where next session of Circuit Court is to be held.
[b] The first day of the next ensuing term of the Circuit Court.
[c] The place where the last session of the Circuit Court was held.
[d] Some day in the preceding term of the Circuit Court.

costs and charges, by expended, in and about prosecuting suit in that behalf, whereof the said convicted, as appears on record.

And also, for interest upon being the principal of the said debt, from the day of in the year of our Lord one thousand eight hundred and (the day on which judgment is entered in this case,) up to the day on which satisfaction shall be entered on this execution.

And have you this writ before the Clerk of the said Court, at[a] according to law.

WITNESS, *the Honorable , Chief Justice of the United States, at*[b] *the*[c] *day of in the year of our Lord one thousand eight hundred and and in the year of the Sovereignty and Independence of the United States of America.*

Plaintiff's Attorney.

WRIT OF ERROR.

THE UNITED STATES OF AMERICA.

The President of the United States to the Judges of the Circuit Court of the United States, for the Sixth Circuit, in and for the District of South Carolina.

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, between A B, plaintiff, and C D, defendant, a manifest error hath happened, to the great damage of the said C D, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and

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[a] The place where next session of Circuit Court is to be held.

[b] The place where last session was held.

[c] Some day in preceding term.

openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS *the Honorable R. B. Taney, Chief Justice of the said Supreme Court, the first*[a] *Monday in December, in the year of our Lord one thousand eight hundred and*

H. Y. GRAY, Clerk Circuit Court.[b]

CITATION.

THE UNITED STATES OF AMERICA.

To A B—Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the district of South Carolina, wherein C D is a plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS *my hand and seal at the city of in the district aforesaid, this day of A. D.* 186[c]

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[a] The writ of error is tested of the first day of the preceding term of the Supreme Court, and returnable to the first day of the ensuing term.

[b] If the writ of error is intended to operate as a *supersedeas*, a copy thereof must be lodged in the Clerk's office within ten days, (see ante page 133,) and bond given and approved by the Judge, who thereupon signs the following order endorsed on the writ:

The (plaintiff or defendant) named in the within writ, having given bond and security as required by law, which is approved, this writ is allowed to operate as a *supersedeas* to the judgment therein mentioned. Witness my hand this day of A. D.

[c] The citation is signed by the Judge, and dated of the day of signature.

WRIT OF ERROR BOND.

Know all men by these presents, that we, C D, K L and G M, are held and firmly bound unto A B, in the full and just sum of dollars, to be paid to the said A B, his certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this day of in the year of our Lord one thousand eight hundred and

Whereas, lately at a Circuit Court of the United States for the ~~south~~ Circuit in and for the district of South Carolina, in a suit pending in said Court between A B, plaintiff, and C D, defendant, judgment was rendered against the said C D, and the said C D hath sued out a writ of error to the Supreme Court of the United States, and to reverse the judgment in the aforesaid suit, and hath filed a copy of said writ in the office of the Clerk of the said Circuit Court, and a citation directed to the said A B, citing and admonishing him to be and appear at a Supreme Court of the United States, to be held at the city of Washington on the first Monday in December next. Now the condition of the above obligation is such, that if the said C D shall prosecute his said writ of error to effect and answer all damages[a] and costs; if he shall fail to make his plea good, then the above obligation to be void, or else to remain in full force and virtue.

Sealed and delivered in the presence of

Approved by[b]

When it is intended to carry the case to the Supreme Court for decision, it is necessary to make up what is technically called the paper book, which contains a transcript of the record, the assignment of error, (either by bill of exceptions or such other form as may be proper under the circumstances,) the writ of error, the citation, the bond to

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[a] If writ of error is not to operate as a *supersedeas*, the bond and security need only be for the costs, and the word "damages" is omitted.

[b] The approval of the bond is by the Judge, who allows the writ of error.

appellee, and finally, the Clerk's certificate that the transcript is a true copy from the record of the proceedings.

There is no prescribed form for the paper book, but it must contain a transcript of the record, and all papers, exhibits, depositions and other proceedings necessary to the hearing in the Supreme Court. The following form of a paper book, will serve as a precedent, to be varied of course according to the exigency of each case.

THE UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA. } To wit.

At a Circuit Court of the United States for the sixth Circuit in and for the district of South Carolina, begun and holden at Columbia in the district aforesaid, on the fourth Monday in November, 1856, before the Honorable A. G. Magrath, Judge of the said United States, for the district of South Carolina, holding said Circuit Court according to the form of the Act of Congress, in such case made and provided, the following proceedings were had:

A B
vs.
C D.

Be it remembered, that heretofore, to wit: the twenty-first day of October, in the year of our Lord one thousand eight hundred and fifty-seven, the said A B, impleaded the said C D in an action on promises, as follows:

[*Here set out the writ.*]

and D. H. Hamilton, Marshal of the said United States, for the district aforesaid, returned said writ, endorsed as follows:

[*Set out Marshal's return, endorsed on writ.*]

and upon the sixth day of November, in the year of our Lord one thousand eight hundred and fifty-seven, the said A B by G W, his attorney, declared in the Circuit Court here against the said C D, in words and of the tenor following:

[*Set out declaration.*]

And on the first day of December, in the year of our

Lord one thousand eight hundred and fifty-seven, comes into Court the said C D by L M, his attorney, and to the declaration of the said A B, files his plea in words and of the tenor as follows:

[*Set out plea and issue.*]

And on the first Monday in April, in the year of our Lord one thousand eight hundred and fifty-eight, comes again into Court the parties aforesaid, by their attorneys aforesaid, and upon motion of the said A B, by his attorney, and by and with the consent of the said C D, by his attorney, further process of and upon the premises aforesaid, is by order of the Court continued until the fourth Monday in November next. At which said Monday in November, in the year of our Lord one thousand eight hundred and fifty-eight, comes into Court the parties aforesaid, by their attorneys aforesaid.

[*Here set out Postea.*]

MEMORANDUM.

Before the jurors withdrew from the bar of the Court here, the said C D, by his attorneys aforesaid, tendered to the Court here the following bill of exceptions, which was by the Court here signed and sealed, and which is in form following, to wit:

DEFENDANT'S BILL OF EXCEPTIONS.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF SOUTH CAROLINA.

A B *vs.* C D. } November Term.

At the trial of the cause the plaintiff to maintain and prove the issue on his part, gave in evidence, [*here insert such parts of plaintiff's evidence as are proper to be inserted; see ante page* 133,] and the defendant to maintain and prove the issue on his part, gave in evidence, [*set out defendant's evidence,*] and the plaintiff in reply to the evidence of the said defendant

and to rebut the same, gave in evidence, [*set out rebutting testimony,*] and the testimony on both sides being closed, the defendant prayed the Court to instruct the jury in the following particulars, [*set out the instructions prayed for.*] But the Court rejected each and every of the instructions prayed for by the defendant, [*state this according to the fact,*] and in lieu thereof instructed the jury, [*set out instructions given by the Court; see ante page* 131.] To the granting of which said instructions and to the refusal of those prayed for by the defendant, the defendants then and there and before the jury had withdrawn from the bar, did except, and inasmuch as the matters aforesaid do not appear by the verdict of the jury, prayed the Court here to sign and seal this his bill of exceptions, which is accordingly done, this day of A. D.

A. G. MAGRATH, Judge.

And now here, at this day, to wit: the day of A. D. the said C D produced here to the said Court, the writ of the said United States of America for the correcting of errors of and upon the promises commanding the record and proceedings aforesaid, of the judgment aforesaid, so rendered as aforesaid, with all things concerning the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington, on the first Monday in December next, which said writ of error is in the words and of the tenor following:

[*Set out writ of error.*]

In pursuance whereof and according to the form and effect of the Act of Congress, in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered with all things relating to the same, together with the said writ of error are hereby transmitted to the said Supreme Court accordingly.

[*Then set out citation and bond, and Clerk's certificate that the transcript is a correct copy of the record.*]

RULES

OF THE

SUPREME COURT OF THE UNITED STATES,

Revised and Corrected at December Term. 1858.

No. 1.

CLERK.

The Clerk of this Court shall reside and keep the office at the seat of the National Government, and he shall not practice either as an attorney or counsellor in this Court or any other Court, while he shall continue to be Clerk of this Court.

The Clerk shall not permit any original record or paper to be taken from the Supreme Court room, or from the office, without an order from the Court.

No. 2.

ATTORNEYS, ETC.

It shall be requisite to the admission of attorneys and counsellors to practice in this Court, that they shall have been such for three years past in the Supreme Courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair.

They shall respectively take the following oath or affirmation, viz: "I do solemnly swear (or affirm, as the case may be,) that I will demean myself, as an attorney and counsellor of this Court, uprightly, and according to law, and that I will support the Constitution of the United States."

No. 3.

PRACTICE.

This Court consider the practice of the Courts of King's Bench and of Chancery, in England, as affording outlines for the practice of this Court; and they will, from time to time, make such alterations therein as circumstances may render necessary.

No. 4.

BILL OF EXCEPTIONS.

Hereafter, the Judges of the Circuit and District Courts shall not allow any bill of exceptions, which shall contain the charge of the Court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepted; and that such matters of law, and those only, shall be inserted in the bill of exceptions, and allowed by the Court.

No. 5.

PROCESS.

All process of this Court shall be in the name of the President of the United States.

When process at common law, or in equity, shall issue against a State, the same shall be served on the Governor, or Chief Executive Magistrate, and Attorney General, of such State.

Process of subpœna, issuing out of this Court, in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and if the defendant, on such service of the subpœna, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*.

No. 6.

MOTIONS.

All motions hereafter made to the Court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

No. 7.

LAW LIBRARY—CONFERENCE ROOM.

1. During the session of the Court, any gentleman of the bar having a cause on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the Clerk of the Court, to receive an order to take the same, (not exceeding at any one time three,) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the Clerk. And it shall be the duty of the Clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for, and forfeit and pay twice the value thereof; as also one dollar per day for each day's detention beyond the limited time.

2. The Clerk shall take charge of the books of the Court, together with such of the duplicate law books as Congress may direct to be transferred to the Court, and arrange them in the conference room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one, except the Judges of the Court.

No. 8.

RETURN TO WRIT OF ERROR, ETC.

1. The Clerk of the Court to which any writ of error shall be directed, may make return of the same, by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the Court.

2. No cause will hereafter be heard until a complete record, containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this Court, shall be filed.

3. Whenever it shall be necessary or proper, in the opinion of the presiding Judge in any Circuit Court, or District Court exercising Circuit Court jurisdiction, that original papers of any kind should be inspected in the Supreme Court, upon appeal, such presiding Judge may make such rule or order for the safe keeping, transporting, and return of such original papers, as to him may seem proper; and this Court will receive and consider such original papers in connection with the transcript of the proceedings.

Amended by adding 4 Return day

No. 9.

DOCKETING CASES.

1. In all cases where a writ of error or an appeal shall be brought to this Court from any judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause, and file the record thereof with the Clerk of this Court within the first six days of the term; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the cause, and file the record thereof with the Clerk of this Court within the first thirty days of the term; and if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed, upon producing a certificate from the Clerk of the Court wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal has been duly sued out and allowed.

And in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record after the

same shall have been docketed and dismissed under this rule, unless by order of the Court.

2. But the defendant in error or appellee may at his option docket the cause, and file a copy of the record with the Clerk of the Court; and if the case is docketed, and a copy of the record filed with the Clerk of this Court, by the plaintiff in error or appellant, within the periods of time above limited and prescribed by this rule, or by the defendant in error or appellee, at any time thereafter during the term, the case shall stand for argument at the term.

3. In all cases where the period of thirty days is mentioned in this rule, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Washington, New Mexico ~~and~~ Utah, Nevada, Arizona, Montana and Idaho.

No. 10.

SECURITY FOR COSTS—PRINTING RECORDS—ATTACHMENT FOR COSTS.

1. In all cases, the Clerk shall take of the party a bond, with competent surety, to secure his fees, in the penalty of two hundred dollars, or a deposit of that amount, to be placed in bank, subject to his draft.

2. In all cases, the Clerk shall have fifteen copies of the records printed for the Court; and the cost of printing shall be charged to the government in the expenses of the Court.

3. The Clerk shall furnish copies for the printer, shall supervise the printing, and shall take care of and distribute the printed copies to the Judges, the reporter, and the parties, from time to time, as required.

4. In each case, the Clerk shall charge the parties the legal fees for but the one manuscript copy in that case.

5. In all cases, the Clerk shall deliver a copy of the printed record to each party. And in cases of dismission, reversal, or affirmance with costs, the fees for the said manuscript copy of the record shall be taxed against the party

against whom costs are given, and which charge includes the charge for the copy furnished him.

6. In cases of dismission for want of jurisdiction, each party shall be charged with one-half the legal fees for a copy.

7. Upon the Clerk of this Court producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them respectively in this Court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively, to compel payment of the said fees.

No. 11.

TRANSLATIONS.

Whenever any record, transmitted to this Court upon a writ of error or appeal, shall contain any document, paper, testimony, or other proceeding, in a foreign language, and the record does not also contain a translation of such document, paper, testimony or other proceeding, made under the authority of the inferior Court, or admitted to be correct, the record shall not be printed, but the case shall be reported to this Court by the Clerk, and the Court will thereupon remand it to the inferior Court, in order that a translation may be there supplied and inserted in the record.

No. 12.

EVIDENCE.

1. In all cases where further proof is ordered by the Court, the depositions which shall be taken shall be by a commission to be issued from this Court, or from any Circuit Court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this Court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this Court, or from any Circuit Court of the United States, under the direction of any

Judge thereof; and no such commission shall issue but upon interrogatories to be filed by the party applying for the commission, and notice to the opposite party, or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: *Provided, however*, that nothing in this rule shall prevent any party from giving oral testimony in open Court in cases where by law it is admissible.

No. 13.

DEEDS, ETC., NOT OBJECTED TO, ETC., ADMITTED, ETC.

In all cases of equity and admiralty jurisdiction heard in this Court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant or other exhibit found in the record, as evidence, unless objection was taken thereto in the Court below, and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

No. 14.

CERTIORARI.

No *certiorari* for diminution of the record shall be hereafter awarded in any cause, unless a motion therefor shall be made in writing; and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such *certiorari* shall be made at the first term of the entry of the cause; otherwise, the same shall not be granted, unless upon special cause shown to the Court, accounting satisfactorily for the delay.

No. 15.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this Court, either party shall die, the proper representatives in

the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit; and thereupon the cause shall be heard and determined, as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order, that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the same reversed, if it be erroneous; *Provided, however*, that a copy of every such order shall be printed in some newspaper at the seat of government, in which the laws of the United States shall be printed by authority, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

No. 16.

NO APPEARANCE OF PLAINTIFF IN ERROR.

Where there is no appearance for the plaintiff in error when the case is called for trial, the defendant may have the plaintiff called, and dismiss the writ of error, or may open the record, and pray for an affirmance.

No. 17.

NO APPEARANCE OF DEFENDANT IN ERROR.

Where the defendant in error fails to appear when the cause shall be called for trial, the Court may proceed to

hear an argument on the part of the plaintiff, and to give judgment according to the right of the cause.

No. 18.

NO APPEARANCE OF EITHER PARTY.

When a case is reached in the regular call of the docket, and no appearance is entered for either party, the case shall be dismissed, at the costs of the plaintiff.

No. 19.

NEITHER PARTY READY AT SECOND TERM.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the costs of the plaintiff, unless sufficient cause is shown for further postponement.

No. 20.

PRINTED ARGUMENTS.

1. In all cases brought here on appeal, writ of error, or otherwise, the Court will receive printed arguments, without regard to the number of the case on the docket, if the counsel on both sides shall choose so to submit the same within the first sixty days of the term: but 20 copies of the arguments, signed by attorneys or counsellors of this Court, must be first filed ~~But the arguments must be filed within the first ten days of the term, and signed by attorneys or counsellors of this Court.~~ 10 of these copies for the Court, two for the reporters, three to be returned by the clerk and the rest for counsel.

2. When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument will be received unless it is filed before the oral argument begins, and the Court will proceed to consider and decide the case upon the *ex parte* argument.

No. 21.

TWO COUNSEL—TWO HOURS—BRIEFS.

1. Only two counsel shall be permitted to argue for each party, plaintiff and defendant, in a cause.

allows only two hours to argument for each side, of case.

2. No counsel will be permitted to speak in the argument of any case more than two hours, without the special leave of the Court, granted before the argument begins.

3. Counsel will not be heard, unless a printed brief or abstract of the case be first filed, together with the points intended to be made, and the authorities intended to be cited in support of them arranged under the respective points; ~~and no other book or case be referred to in the argument.~~ See manuscript copy of paragraph from 4 to 8 inclusive

9 ~~4.~~ The same shall be signed by an attorney or counsellor of this Court.

10 ~~5.~~ If one of the parties omits to file such a statement, he cannot be heard, and the case will be heard *ex parte* upon the argument of the party by whom the statement is filed.

11 ~~6. Fifteen~~ twenty printed copies of the abstract, points, and authorities, required by this rule, shall be filed with the Clerk three days before the case is called for argument; ~~nine of these copies for the Court, one for the reporter, one to be retained by the Clerk, and the residue for counsel.~~ of the plaintiff in error or appellant & six days by the defendant in error or appellee

12 ~~7.~~ When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party. But if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

No. 22.

ORDER OF ARGUMENT.

The plaintiff or appellant in this Court shall be entitled to open and conclude the case. But, when there are cross-appeals, they shall be argued together as one case, and the plaintiff in the Court below shall be entitled to open and conclude the argument.

No. 23.

INTEREST, ETC.

1. In cases where a writ of error is prosecuted to the Supreme Court, and the judgment of the inferior Court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the Courts of the State where such judgment is rendered.

2. The same rule shall be applied to decrees for the payment of money in cases in chancery, unless otherwise ordered by this Court.

3. In all cases where a writ of error shall delay the proceedings on the judgment of the Circuit Court, and shall appear to have been sued out merely for delay, damages shall be awarded, at the rate of *ten per centum per annum* on the amount of the judgment; and the said damages shall be calculated from the date of the judgment in the Court below until the money is paid.

No. 24.

COSTS.

1. In all cases where any suit shall be dismissed in this Court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed for the defendant in error, or appellee, as the case may be, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this Court, costs shall be allowed to the defendant in error, or appellee, as the case may be, unless otherwise ordered by the Court.

3. In all cases of reversals of any judgment or decree in this Court, costs shall be allowed in this Court for the plaintiff in error or appellant, as the case may be, unless otherwise ordered by the Court.

4. Neither of the foregoing rules shall apply to cases

where the United States are a party; but in such cases no costs shall be allowed in this Court for or against the United States.

5. In all cases of the dismissal of any suit in this Court, it shall be the duty of the Clerk to issue a mandate, or other proper process, in the nature of a *procedendo*, to the Court below, for the purpose of informing such Court of the proceedings in this Court, so that further proceedings may be had in such Court as to law and justice may appertain.

6. When costs are allowed in this Court, it shall be the duty of the Clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the Court below, and annex to the same the bill of items taxed in detail.

No. 25.

OPINIONS OF THE COURT.

1. All opinions delivered by the Court shall immediately, upon the delivery thereof, be delivered over to the Clerk to be recorded. And it shall be the duty of the Clerk to cause the same to be forthwith recorded, and to deliver the originals, with a transcript of the judgment or decree of the Court thereon, to the reporter, as soon as the same shall be recorded.

2. And all the opinions of the Court, as far as practicable, shall be recorded during the term, so that the publication of the reports may not be delayed thereby.

3. The ~~original~~ opinions of the Court, ~~delivered to the reporter~~, shall be filed ~~in the office of~~ the Clerk of the Court, for preservation, ~~as soon as the volume of reports for the term, at which they are delivered, shall be published.~~

No. 26.

CALL OF THE DOCKET.

The Court, on the second day in each term, will commence calling the cases for argument in the order in which

they stand on the docket, and proceed from day to day during the term, in the same order; and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the cause shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the Court. That ten causes only shall be considered as liable to be called on each day during the term, including the one under argument, if the same shall not be concluded on the preceding day. No cause shall be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances, to be shown to the Court. Every cause which shall have been called in its order, and passed, and put at the foot of the docket, shall, if not again reached during the term it was called, be continued to the next term of the Court.

No. 27.

MOTION DAY.

The Court will not hear arguments on Saturday, (unless for special cause it shall order to the contrary,) but will devote that day to the other business of the Court; and on Friday in each week, during the sitting of the Court, motions in cases not required by the rules of the Court to be put on the docket shall be entitled to preference, if such motions shall be made before the Court shall have entered on the hearing of a cause upon the docket.

No. ~~28.~~ 27

ADJOURNMENT.

The Court will, at every session, announce on what day it will adjourn at least ten days before the time which shall be fixed upon; and the Court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

No. ~~29.~~ 28

DISMISSING CASES IN VACATION.

Whenever the plaintiff and defendant in a writ of error pending in this Court, or the appellant and appellee in any appeal, shall at any time hereafter, in vacation and out of term time, by their respective attorneys, who are entered as such on the record, sign and file with the Clerk an agreement in writing, directing the case to be dismissed, and specifying the terms upon which it is to be dismissed as to costs, and also paying to the Clerk any fees that may be due to him, it shall be the duty of the Clerk to enter the case dismissed, and to give to either party which may request it a copy of the agreement filed; but no mandate or other process is to issue without an order by the Court.

No. 29. Supersedeas.

Supersedeas bonds in the circuit courts must be taken with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ of appeal to effect and answer all damages and costs if he fail to make his plea good. Such indemnity, where the decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree including "just damages for delay" and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevins, and in suits on mortgages; or where the property is in the custody of the marshal under admiralty process, as in the case of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property and the costs of the suit and "just damages for delay," and costs and interest on the appeal.

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Conner, James.
The history of a suit at law.